Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DAVID S. HESS, MOTORCITY OF JACKSONVILLE, LTD., and MOTORCITY OF JACKSONVILLE, INC.,
Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR SOUTHEAST BANK, N.A., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048 (1994), allows federal courts to create federal common-law rules as part of an "evolving" *D'Oench* doctrine to bar state-law claims when those claims are not barred by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).

PARTIES

In addition to the named parties to this proceeding, other respondents include Southeast Bank, N.A. and David Feigenbaum.

LIST PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state the following:

> Motorcity of Jacksonville, Ltd. and Motorcity of Jacksonville, Inc. have no parent companies or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit sitting *en banc* was issued on May 8, 1996, is reported at 83 F.3d 1317 (11th Cir. 1996), and is included in the Appendix at 1a-55a. The panel opinion of the Eleventh Circuit was issued December 5, 1994, is reported at 39 F.3d 292 (11th Cir. 1994), and is included in the Appendix at 56a-73a. The initial Order of

the United States District Court for the Southern District of Florida dismissing petitioners' complaint was issued on November 25, 1992 and is included in the Appendix at 76a-83a; a second order denying petitioners' motions for rehearing and for leave to amend their complaint was issued on May 10, 1993 and is included in the Appendix at 74a-75a.

JURISDICTION

The opinion and judgment of the court of appeals was entered on May 8, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1823(e)(1) provides:

> No agreement which tends to diminish or defeat the interest of the [Federal Deposit Insurance Corporation (FDIC)] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement—
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1821(d)(9)(A) provides:

> [A]ny agreement which does not meet the requirements set forth in section 1823(e) of this title shall

> not form the basis of, or substantially comprise, a claim against the receiver or the [FDIC].

12 U.S.C. § 1821(d)(2)(H) provides:

> The [FDIC], as conservator or receiver, shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter.

STATEMENT OF THE CASE

This case presents a recurring and important issue that has divided several United States Courts of Appeals: whether an "evolving" federal common-law *D'Oench* doctrine may continue to be created in light of the extensive regulatory framework of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, and this Court's recent decision in *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048 (1994). It is undisputed that FIRREA has codified many protections for the FDIC that were initially created by federal common law in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942). Indeed, it is undisputed that *D'Oench* itself would be decided exactly the same way today under 12 U.S.C. § 1823(e). The question here is whether federal courts can continue to create new federal common-law rules to bar state-law claims that are permitted by FIRREA generally and by 12 U.S.C. § 1823(e) in particular.

In this case, the Eleventh Circuit, sitting *en banc*, held that FIRREA has not displaced a "vast" and "evolving" common-law *D'Oench* doctrine, and thus the court of appeals created rules under that "evolving" doctrine to bar petitioners' contract, fiduciary duty, and negligence claims. App. 20a-28a, 53a. In so holding, the Eleventh Circuit expressly acknowledged that it was in direct conflict with decisions of the United States Courts of Appeals for the District of Columbia and Eighth Circuits. App. 14a (citing *Murphy* v. *FDIC*, 61 F.3d 34, 38 (D.C. Cir.

1995); *DiVall Insured Income Fund Ltd. Partnership* v. *Boatmen's First Nat'l Bank*, 69 F.3d 1398, 1402 (8th Cir. 1995)). Moreover, the Eleventh Circuit's decision to continue to create common-law rules to supplement, and thus alter, FIRREA is inconsistent with a controlling decision of this Court, *O'Melveny & Myers* v. *FDIC*, *supra*, as well as a long line of precedent on the severely limited role of federal common law. See, *e.g.*, *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313-14 (1981); *Northwest Airlines, Inc.* v. *Transport Workers Union of Am.*, 451 U.S. 77, 95-97 (1981). For all these reasons, the Court should grant this petition.

FACTUAL BACKGROUND

This case arises out of unchallenged allegations that a Florida bank breached its promise and tortiously and directly caused the failure of petitioner David S. Hess's business at a cost of $1.4 million.[1] In 1986, Hess, along with his brother, first explored the possibility of a new kind of automobile business—a used car dealership that had modern, upscale services and facilities similar to those of a new car dealership. See App. 85a (photograph).

As a cardiologist, Hess had been a longstanding customer of the Jacksonville office of respondent Southeast Bank, N.A., in whose place the FDIC now stands as a receiver. Hess negotiated with Southeast's Jacksonville office regarding financing for the car dealership, and this office provided all the financing needed except the "floor-plan financing" necessary for ongoing inventory purchases. For floor-plan financing, the Jacksonville office referred Hess to Southeast's Miami office, which, he was told, had the necessary expertise in this specialized financing.

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[1] The facts as stated in this petition are taken largely from the Eleventh Circuit's decision and from the allegations in petitioners' Amended Complaints, all of which are assumed true on appeal from a motion to dismiss.

Southeast's Miami office showed great interest in providing floor-plan financing for the business that the Hesses named Motorcity. A Southeast officer, David Feigenbaum, reiterated to Hess that the Miami office had considerable experience in floor-plan financing and that Southeast had handled the Miami floor plan for the largest car dealership in the country. Hess made it clear that he and his brother were inexperienced and would be absentee owners, busy with their professional practices. Southeast and Hess discussed the importance of preventing a problem unique to financing the inventory of a car dealership—"out-of-trust" sales. (As each car was sold, Motorcity was obligated to repay to Southeast the portion of the loan designated for that particular car, plus interest. Failure to repay the loan after each car is sold renders the sale "out of trust.") Hess inquired whether Southeast would conduct monthly audits. Hess emphasized that he would be relying on the bank's experience, and wanted to be notified if the bank discovered anything amiss, particularly if there were out-of-trust sales, whether discovered through the audits or by rumor. Southeast represented that it would conduct periodic audits and contact Hess immediately upon discovering any out-of-trust sales or other irregularities.

In April 1987, Southeast issued a commitment letter for credit not to exceed $750,000, with $375,000 of collateral in the form of a certificate of deposit. Two months later, Motorcity and Southeast executed a floor-plan financing agreement.

Motorcity opened for business in September 1987. Shortly thereafter, Southeast began conducting monthly audits of the dealership's floor plan through an independent auditor. Southeast quickly learned that numerous out-of-trust sales were occurring and that these sales could result in the closure of Motorcity. In breach of its promise, nobody at Southeast ever informed the Hesses about the out-of-trust sales. Hess spoke once or twice each month

with Feigenbaum, the Southeast officer with whom he had negotiated. Feigenbaum informed Hess that Southeast had hired an independent auditor to audit Motorcity's floor plan. However, Southeast sent the Hesses only a net operating statement that did not reflect vehicle-by-vehicle sales. Hess regularly reiterated to Feigenbaum his concern regarding out-of-trust sales and his reliance on Southeast's expertise.

Southeast did contact Hess about other irregularities, all of which Hess addressed. For example, after being notified by Southeast, Hess corrected a discrepancy between the book value and the price paid by the dealership for a vehicle. Southeast even recommended that Motorcity hire certain employees, and Motorcity followed those recommendations.

In 1988, Southeast compounded its breach by extending Motorcity's credit, while telling the Hesses that additional credit was necessary only because of the size of their inventory. In fact, it was the out-of-trust sales that made the extension necessary. Feigenbaum even telephoned Hess on several occasions to report that Southeast had received "good" floor-plan reports.

In early 1989, two weeks after a "good" floor-plan report, a newly hired general manager at Motorcity informed Hess that the dealership was out of trust more than $400,000. Virtually the entire time Southeast had audited Motorcity, the previous managers of Motorcity had engaged in out-of-trust sales, diverting the money to pay for substantial bonuses for themselves. Hess immediately notified Southeast. Southeast's response was to send Feigenbaum to Jacksonville to inspect the inventory. Feigenbaum's inspection confirmed what Southeast already knew —that there were out-of-trust sales—and showed, moreover, that the out-of-trust amount might exceed the collateral. Based on the out-of-trust sales, Southeast demanded payment and in February 1989 Southeast seized control of

Motorcity's bank accounts, vehicles, and titles, shut down the floor plan, and began to control the sale of all vehicles at Motorcity.

PROCEDURAL BACKGROUND

As the FDIC concedes, by April 30, 1990, Hess had fully repaid every obligation owed to Southeast associated with the Motorcity financing. Thereafter, in October 1990, petitioners filed this action against Southeast in Florida state court, alleging breach of oral agreement, breach of fiduciary duty, and negligence. A year later—one-and-a-half years *after* Hess repaid all of his loans—Southeast was declared insolvent and the FDIC was appointed receiver. The FDIC substituted itself as defendant in this action and removed the case to the United States District Court for the Southern District of Florida. Southeast is under receivership, but is in the unusual circumstance of having at least a $28 million surplus. All creditors with valid claims against the Southeast receivership are expected to regain their principal and may receive a portion of the interest. [2]

In September 1992, the FDIC moved to dismiss petitioners' action for failure to state a claim, arguing that the written loan agreement obligated Southeast neither to conduct the audits nor to notify Hess of any irregularities Southeast might discover. The FDIC further argued that to the extent petitioners were relying on oral promises or representations, their claims were barred under the federal common-law *D'Oench* doctrine, see *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and the related statutory provision, 12 U.S.C. § 1823(e). Petitioners then requested leave to amend their complaint to make clear that they wished to assert tort as well as contract claims. On November 25, 1992, the district court granted the FDIC's motion to dismiss, agreeing that Southeast had no

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[2] *Trustee for Southeast Seeks to Distribute Bank Assets to Holders*, Wall Street J., April 4, 1994, at A5G.

duty to audit Motorcity, and that any oral side agreement was unenforceable under both *D'Oench* and § 1823(e). The district court further held that petitioners could not amend their complaint because such tort claims would also be barred by *D'Oench* and § 1823(e). On December 9, 1992, petitioners moved for rehearing and formally moved for leave to amend their complaint to include claims for negligence and breach of fiduciary duty. The district court denied this motion on May 10, 1993.

On appeal to the Eleventh Circuit, a three-judge panel unanimously held that petitioners' tort claims fell within the "free standing tort" exception to *D'Oench* and therefore reversed the district court's judgment and remanded the case. App. 56a-73a. The panel, after explaining that a free standing tort is a claim unrelated to regular banking transactions, held that petitioners' claims "do not . . . implicate the records of regular banking transactions" and therefore are "protected from the bar of the *D'Oench* doctrine." App. 70a.

The FDIC filed a petition for rehearing and a suggestion for rehearing *en banc*. The Eleventh Circuit granted rehearing *en banc* on July 12, 1995, and affirmed the judgment of the district court on May 8, 1996. App. 1a-2a. In doing so, the Eleventh Circuit expressly and squarely disagreed with the District of Columbia and Eighth Circuits on the viability of the federal common-law *D'Oench* doctrine, and set forth a novel and improperly narrow interpretation of this Court's decision in *O'Melveny & Myers*.[3] The Eleventh Circuit specifically

[3] If this Court grants the petition and ultimately reverses the judgment below, petitioners' claims under Florida law can be properly considered on remand. The Florida state court judge, prior to the FDIC's entrance and removal to federal court, denied the bank's motion to dismiss petitioners' state-law claims. App. 84a. The Eleventh Circuit's lengthy discussion of the viability of petitioners' claims similarly indicates that, absent its interpretation of *D'Oench*, petitioners have stated viable claims under state law. App. 39a, 41a, 42a n.22, 44a, 50a n.27, 51a, 53a.

held that because Congress had not undertaken a "comprehensive examination" of the "the *evolving* common law *D'Oench* doctrine," which the Eleventh Circuit described as "vast," nothing in FIRREA or *O'Melveny* should be read to displace that doctrine, or to restrict its further evolution. App. 24a, 25a (emphasis added). The Eleventh Circuit acknowledged: "We disagree with the analysis of the D.C. and the Eighth Circuits and hold that the federal common law *D'Oench* doctrine has not been preempted by statute." App. 14a; see also App. 19a ("We disagree with *Murphy's* [the D.C. Circuit decision's] reliance on *O'Melveny*.").

STATUTORY BACKGROUND

D'Oench, Duhme & Co. v. *FDIC*, 315 U.S. 447 (1942), fashioned a rule of federal common law barring state-law defenses against the FDIC that are based on secret agreements between a failed bank and its debtors. *D'Oench* involved a securities dealer who sold bonds to a bank. The bond issuer subsequently defaulted. To help the bank conceal the past due bonds in its records, the dealer executed promissory notes in the amount of the bonds. In return, the bank secretly agreed not to call for payment on the notes. Nonetheless, the bank carried the notes on its books as assets. When the bank failed, the FDIC sued for payment of the notes, and the dealer asserted the defense of lack of consideration. *D'Oench* held that to allow the dealer to rely upon the secret agreement in defense of payment would run contrary to the policy of protecting the FDIC and its fund against misrepresentations regarding the bank's assets. Writing for the majority, Justice Douglas fashioned a new rule of federal common law estopping the maker of a secret agreement from relying on the agreement as a defense to collection of a bank asset by the FDIC whenever the maker has "lent himself to a scheme or arrangement whereby the [FDIC] was or was likely to be misled." *Id.* at 460.

The specific rule of federal law created in *D'Oench* was itself fashioned in a statutory vacuum, see *id.* at 459, but was enacted by Congress eight years later. Federal Deposit Insurance Act of 1950, Pub. L. No. 81-797, § 13(e), 64 Stat. 873, 889 (codified at 12 U.S.C. § 1823(e) (1952)). The codification was both narrower and more expansive than the *D'Oench* opinion. On the one hand, the statute was more expansive than the case in that it applied to certain agreements even if the borrower had not participated in a scheme in which the FDIC "was or was likely to be misled." Compare *D'Oench*, 315 U.S. at 460 with 12 U.S.C. § 1823(e). At the same time, the statute's scope was narrower than the broadest interpretation of *D'Oench*'s dictum, although it was broad enough to cover *D'Oench*'s specific holding. While *D'Oench* created a judicial rule of equitable estoppel, § 1823(e) barred defenses only when explicit requirements of the statute were met. For example, the statute only applied to an agreement that "diminish[es]" an FDIC asset, not to all unwritten agreements. 12 U.S.C. § 1823(e).

For decades, the Court had no occasion to address the effect of § 1823(e) on the ability of the federal courts to expand federal common law to invalidate claims that were permitted by § 1823(e). In fact, the next occasion this Court had to discuss *D'Oench* was in *Langley* v. *FDIC*, 484 U.S. 86 (1987). In *Langley*, a borrower sought to avoid payment on a note by claiming the failed bank had procured the note by misrepresenting the value of the underlying property. This Court held that § 1823(e) applied and used *D'Oench* only to interpret § 1823(e). Thus, *Langley* did not explicitly decide the issue of whether the statute prevented the further "evolution" of a common-law *D'Oench* doctrine. However, the Court did refer to *D'Oench* as the leading case in the area *"prior to* enactment of § 1823(e)." 484 U.S. at 92 (emphasis added); see *Murphy* v. *FDIC*, 61 F.3d 34, 39 (D.C. Cir. 1995). Most important, *Langley* indicated that if an agreement is permitted by § 1823(e) it "prevails even if the FDIC did

not know of it . . . . *It would be rewriting the statute to hold otherwise.*" 484 U.S. at 95 (emphasis added). Shortly after *Langley*, the Court described borrower claims against a federal receiver based on a savings and loan's oral agreements and torts as governed by "state law." *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 577, 578, 585 (1989).

In 1989, § 1823(e) was modified with the enactment of FIRREA. FIRREA adopted several expansions to the provision enacted in 1950. For example, § 1823(e) was extended to protect the FDIC in its capacity as receiver of a failed bank, to the Resolution Trust Corporation (RTC) in either receiver or corporate capacity, and to bridge banks. Section 217(4) of FIRREA, Pub. L. No. 101-73, 103 Stat. 183, 256 (codified at 12 U.S.C. § 1823(e)) (FDIC as receiver); 12 U.S.C. § 1441a(b)(4)(A) (RTC); *id.* § 1821(n)(4)(I) (bridge banks). In addition, 12 U.S.C. § 1821(d)(9)(A) was added, and it provides that "any agreement which does not meet the requirement set forth in § 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the [FDIC]." *Id.* § 1821(d)(9)(A). FIRREA also added a gap-filling provision that required the FDIC to "pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations *of this chapter.*" *Id.* § 1821(d)(2)(H) (emphasis added).

This Court first considered the effect of FIRREA on the judicial creation of federal common law in *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048 (1994). At particular issue was the meaning and applicability of a FIRREA provision that states that the FDIC shall "by operation of law, succeed to . . . all rights, titles, powers, and privileges of the insured depository institution." 12 U.S.C. § 1821(d)(2)(A)(i). The defendant in *O'Melveny* maintained that, under this section, any defense available against a failed bank would likewise be good against the FDIC as receiver. 114 S. Ct. at 2054. The FDIC argued that the

statute was nonexclusive and that federal common law was available to supplement the FDIC's rights. *Id.* This Court unanimously rejected the FDIC's argument and stated that it "would [not] adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.*

REASONS FOR GRANTING THE PETITION

The decision below expressly and squarely conflicts with other circuits' holdings on the question whether federal common law arising out of *D'Oench* has been preempted by statute. Moreover, the Eleventh Circuit's holding is inconsistent with *O'Melveny* and a long line of cases from this Court that culminated in *O'Melveny*. For these reasons, this case merits review.

I. THE DECISION BELOW EXPRESSLY AND SQUARELY CONFLICTS WITH THE DECISIONS OF BOTH THE DISTRICT OF COLUMBIA AND EIGHTH CIRCUITS.

As the Eleventh Circuit acknowledged, its holding creates a conflict among the circuits on the question whether an evolving common-law *D'Oench* has been preempted by statute. App. 14a. The court stated: "We disagree with the analysis of the D.C. and the Eighth Circuits and hold that the federal common law *D'Oench* doctrine has not been preempted by statute." *Id.* This circuit split is most clearly presented by a comparison between the Eleventh Circuit's decision and the D.C. Circuit's decision in *Murphy* v. *FDIC*, 61 F.3d 34 (D.C. Cir. 1995), which presented facts similar to the facts here.[4]

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[4] Indeed, the conflict is highlighted by the fact that Murphy, like Hess in this case, was suing FDIC as receiver *for Southeast Bank*.

Murphy concerned an investor in a failed real estate venture. The investor sought damages from the FDIC on the theory that the now-insolvent lender on the project had assumed the legal duties of a partner and had caused the venture to fail. *Id.* at 35. The district court in *Murphy* granted summary judgment in favor of the FDIC on the ground that the plaintiff was unable to point to a written agreement supporting his theory of liability and so was barred from asserting his claims by *D'Oench*. *Id.* at 35-36. The plaintiff asserted on appeal, however, that 12 U.S.C. § 1823(e) could be used to bar claims only where the FDIC could demonstrate that its interest in a specific asset would be diminished if the plaintiff were successful. *Id.* at 37. The plaintiff also asserted that no federal common-law *D'Oench* rule could be used to bar his claims because federal common law had been displaced by FIRREA. *Id.* at 36.

The D.C. Circuit in a unanimous opinion by Judge Ginsburg, joined by Chief Judge Edwards and Judge Wald, agreed with the investor on both counts, holding that (1) the asset "diminish[ment]" requirement of § 1823(e) was not met where the loan had been paid off prior to the bank entering receivership,[5] and (2) under *O'Melveny*, FIRREA displaced federal common-law *D'Oench* doctrine as a separate bar to claims against the FDIC. *Id.* at 37-39. The *Murphy* court stated, "[I]n *O'Melveny &*

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[5] Numerous other appellate courts have concurred with the D.C. Circuit's interpretation of the specific asset requirement of § 1823(e). *See Inn at Saratoga Assocs.* v. *FDIC*, 60 F.3d 78, 82 (2d Cir. 1995); *John* v. *RTC*, 39 F.3d 773, 776-77 (7th Cir. 1994); *Murphy* v. *FDIC*, 38 F.3d 1490, 1500 (9th Cir. 1994) (en banc); *Villafane-Neriz* v. *FDIC*, 20 F.3d 35, 40, 41 (1st Cir. 1994); *Thigpen* v. *Sparks*, 983 F.2d 644, 648-49 (5th Cir. 1993); *Commerce Fed. Sav. Bank* v. *FDIC*, 872 F.2d 1240, 1246 (6th Cir. 1989). The Eleventh Circuit expressly declined to disagree. App. 29a-30a ("In light of our holding that the federal common law *D'Oench* doctrine has not been preempted, we need not decide whether §§ 1821(d)(9)(A) or 1823(e)(1) are limited to claims that impair the FDIC's interest in a specific asset.").

Myers the Supreme Court does not flatly state that *D'Oench* has been preempted by the FIRREA, but it does set forth some more general propositions that, we think lead ineluctably to that conclusion." *Id.* at 38. The court also noted that the *O'Melveny* Court had been "specifically advised by both sides on brief and at oral argument that resolution of the issue before it could also affect the *D'Oench* doctrine." *Id.* at 39. Whereas the Eleventh Cir-Circuit held *O'Melveny* to be inapplicable, the D.C. Circuit interpreted *O'Melveny* to hold that FIRREA excludes "overlapping federal common law defenses not specifically mentioned in the statute—of which the *D'Oench* doctrine is one." *Id.*

Similarly, the Eleventh Circuit's holding expressly conflicts with the decision of the Eighth Circuit in *DiVall Insured Income Fund Ltd. Partnership* v. *Boatmen's First National Bank*, 69 F.3d 1398 (8th Cir. 1995). In *DiVall*, the district court granted summary judgment against the plaintiff based on the federal holder-in-due-course doctrine. *Id.* at 1400. The Eighth Circuit reversed, applying *O'Melveny* to hold that the extensive provisions of FIRREA preempted a federal common-law *D'Oench* rule. The court held:

> When Congress enacted the comprehensive regulatory framework of FIRREA, it preempted the federal common law rules that restricted the claims and defenses which parties could raise against the FDIC. Accordingly, we hold that *O'Melveny* removes the federal common law *D'Oench, Duhme* doctrine and the federal holder in due course doctrine.

Id. at 1402.[6]

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[6] One indication of the importance of this issue is that the FDIC sought rehearing *en banc* in the D.C. and Eighth Circuits. The FDIC's petitions were denied in both cases. *See Murphy* v. *FDIC*, 61 F.3d 34 (D.C. Cir. 1995); *DiVall Insured Income Fund Ltd. Partnership* v. *Boatmen's First Nat'l Bank*, 1996 U.S. App. LEXIS 1262 (8th Cir. Jan. 26, 1996).

The split among the circuits on this issue is further highlighted by the Ninth Circuit's indication that *O'Melveny* means that common-law *D'Oench* has been displaced by statute. See *FDIC* v. *O'Melveny & Myers*, 61 F.3d 17, 18-19 (9th Cir. 1995) (per curiam) (*D'Oench* and lower court cases expanding *D'Oench* "have now been overruled by the Supreme Court").[7] In addition, the Third Circuit has "note[d] that the *D'Oench, Duhme* doctrine may no longer be a separate bar to plaintiffs' claims." *DiMuzio* v. *RTC*, 68 F.3d 777, 780 n.2 (3d Cir. 1995) (citing *O'Melveny* and *Murphy*). The First Circuit has observed that "a circuit split appears to have developed over the question of whether [§] 1823(e) has preempted *D'Oench*." *Adams* v. *Zimmerman*, 73 F.3d 1164, 1168-69 n.2 (1st Cir. 1996) (citing *Murphy*, *DiVall*, and *FDIC* v. *McClanahan*, 795 F.2d 512, 514 n.1 (5th Cir. 1986)). Thus, there can be no doubt that the decision below conflicts with the decisions of other courts of appeals on the same issue.

The question presented here is not whether the specific holding of *D'Oench* itself should be overruled because that holding is codified in 12 U.S.C. § 1823(e). Rather, the question is whether, for claims Congress elected *not* to bar by statute, federal courts can fashion "evolving" federal common-law defenses limiting the civil liability of the FDIC as successor to a failed bank. If this Court agrees with the Eighth and D.C. Circuits that Congress displaced any evolving common-law doctrine, no part of any "evolving" *D'Oench* "doctrine" that was not codified could serve as an independent bar to state-law claims that are permitted by the statute.

The question of the viability of federal common-law *D'Oench* is implicated in federal court cases several times each month. In the two years since this Court decided

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[7] Dicta in another Ninth Circuit opinion also doubts the viability of federal common-law *D'Oench*. *See RTC* v. *Kennelly*, 57 F.3d 819, 822 n.3 (9th Cir. 1995) ("There is serious doubt whether *D'Oench, Duhme* survives *O'Melveny & Myers v. FDIC*.") (citation omitted).

O'Melveny, federal successors have relied on *D'Oench*, at least in part, in approximately 120 reported cases.[8] Given the continuing reliance of federal successors including the FDIC on an evolving common-law *D'Oench* doctrine, this case presents an important and recurring issue that warrants review by this Court.

II. THE DECISION BELOW CONFLICTS WITH *O'MELVENY* AND OTHER PRECEDENTS OF THIS COURT.

Review by this Court is also warranted because the Eleventh Circuit's decision to apply common-law *D'Oench* to cases not covered by FIRREA conflicts with this Court's decision in *O'Melveny*. In misinterpreting and misapplying *O'Melveny*, the court below necessarily disregarded the bedrock of this Court's opinions on the role of federal common law on which *O'Melveny* stands.

A. The Decision Below Conflicts with *O'Melveny*.

1. *This Court Has Already Held That FIRREA Cannot Be Supplemented with Federal Common Law.*

The Eleventh Circuit's decision to apply federal common-law *D'Oench* is contrary to this Court's holding in *O'Melveny & Myers* v. *FDIC*. In *O'Melveny*, this Court held that FIRREA is a comprehensive statutory scheme that courts cannot supplement with federal common law:

> [P]rovisions of FIRREA . . . specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver. See . . . [*inter alia*] § 1821(d)(9) (excluding certain state-

[8] Of the 138 cases in Westlaw's database that cited *"D'Oench"* since June 14, 1994, at least 120 both involve a federal successor and discuss *D'Oench* as a bar to the plaintiff's claims. *See also Capizzi* v. *FDIC*, 937 F.2d 8, 11 (1st Cir. 1991) (Breyer, C.J.) ("anywhere from nearly 10 percent to about 20 percent of cases over the last five years in which the FDIC has been a party has involved the *D'Oench* defense in some manner").

> law claims against FDIC based on oral agreements by the S & L). *Inclusio unius, exclusio alterius.* It is hard to avoid the conclusion that [the statute] places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional "federal common-law" exceptions is not to "supplement" this scheme, but to alter it.

114 S. Ct. at 2054. Section 1821(d)(9) is one of the FIRREA provisions that codifies part, but only part, of the *D'Oench* doctrine, and this Court listed it as one rule of the *exclusive* set of federal rules of decision found in FIRREA itself. *Id.*[9]

The D.C. Circuit in *Murphy* correctly held that *O'Melveny* "necessarily decided the *D'Oench* question. To translate: the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute—of which the *D'Oench* doctrine is one." *Murphy*, 61 F.3d at 39; see also *DiVall*, 69 F.3d at 1402. In *O'Melveny*, this Court effectively ruled that federal courts cannot "supplement" or "alter" FIRREA by applying non-codified parts of any evolving *D'Oench* federal common-law doctrine. The Eleventh Circuit, however, misunderstood the message.

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[9] Moreover, as *O'Melveny* recognized, *see* 114 S. Ct. at 2055-56, federalism commands that the general "presumption" that state law governs, rather than a judicially-created federal rule of decision, is "particularly strong" in areas traditionally governed by state law, such as contracts and torts. *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991); *see also Patterson* v. *McLean Credit Union*, 491 U.S. 164, 183 (1989) ("Although we must do so when Congress plainly directs, as a rule we should be and are 'reluctant to federalize' matters traditionally covered by state common law," including "contracts.") (citation omitted).

2. O'Melveny *Is Part of a Long Series of Cases Holding That Principles of Federalism and Separation of Powers Greatly Constrain the Role of Federal Common Law.*

The Eleventh Circuit attempted to distinguish *O'Melveny* by stating that its holding is limited to cases where the Court is asked to create a *new* federal common-law doctrine. App. 20a-21a. As the D.C. Circuit recognized in *Murphy*, that approach embodies an unnaturally cramped reading of *O'Melveny*'s holding and ignores this Court's prior decisons on "the impact of comprehensive new legislation upon existing federal common law." *Murphy*, 61 F.3d at 40 (citing *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 314-15 (1981)).

O'Melveny applies to all federal common-law rules related to but not contained in "comprehensive" statutes like FIRREA. 114 S. Ct. at 2054. Nevertheless, the Eleventh Circuit has asserted its authority to declare a common-law rule in place of Congress's comprehensive policy determinations. See App. 14a-28a. As the District of Columbia and Eighth Circuits have recognized, *O'Melveny*—and the cases from this Court upon which it relied—command otherwise. Where Congress has spoken conclusively, as in FIRREA, courts are not empowered to supplement the statute by common law. *O'Melveny*, 114 S. Ct. at 2054 (citing *Northwest Airlines, Inc.* v. *Transport Workers Union of Am.*, 451 U.S. 77, 97 (1981); *City of Milwaukee*, 451 U.S. at 319).

By reading *O'Melveny* so narrowly, the court below took *O'Melveny* out of its doctrinal context. *O'Melveny* is part of a long line of this Court's decisions holding that principles of federalism and separation of powers permit only a very limited role for federal common law, particularly where there is a comprehensive statutory scheme. As the D.C. Circuit in *Murphy* recognized, this Court has

held that existing common law can "disappear" after Congress enacts a comprehensive statutory scheme:

> "[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law-making by federal courts disappears. . . . [The Court's] commitment to the separation of powers is too fundamental to continue to rely on federal common law . . . when Congress has addressed the problem."

Murphy, 61 F.3d at 40 (quoting *City of Milwaukee*, 451 U.S. at 314-15) (alterations in *Murphy*). This Court has repeatedly held that

> once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law.

Northwest Airlines, 451 U.S. at 95 n.34; see *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 70 (1966) (the fact that Congress has displaced some state law by enacting "statutory defenses" provides "no reason for creating at large a federal common law"); *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966) (Congress's specific exceptions to state law do not authorize federal courts to "invent" other exceptions); *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-87 (1952) ("[B]ecause Congress while acting in the field has stopped short of approving the rule . . . here urged, we think it would be inappropriate for us to do so."); accord *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 644-46 (1981); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 623-25 (1978).

The Eleventh Circuit improperly supplemented and thus altered FIRREA, ignoring the federalism and separation of powers interests recognized by this Court. See, *e.g.*, *O'Melveny*, 114 S. Ct. at 2053-56; *City of Milwau-*

kee, 451 U.S. at 312-13. Only by so disregarding this Court's precedents could the court below arrive at its uniquely cramped interpretation of *O'Melveny*. The decision below is so at odds with these principles that, even absent the express circuit split, certiorari should be granted and the decision reversed.

B. The Decision Below Misapplies the "Speak Directly" Test.

In addition to its misreading of *O'Melveny*, the court below erred by misapplying the "speak directly" test of *United States* v. *Texas*, 507 U.S. 529 (1993). First, that test does not apply here. Second, if it did apply, it would clearly be satisfied. Third, this Court rejected the same "speak directly" argument in *O'Melveny*.

1. *The "Speak Directly" Test Does Not Apply Here.*

In *Texas*, this Court held a pre-existing, on-point federal common-law rule of the Supreme Court is only preempted by a statute when Congress "speak[s] directly" to that issue. *Id.* at 534. The "speak directly" test, however, applies only when there is an existing directly on-point federal common-law rule set forth by this Court prior to the statute.

In contrast, in this case, there was no established rule set forth by this Court barring claims like that of Hess when Congress first enacted 12 U.S.C. § 1823(e) or when Congress enacted FIRREA. Hess's claims are very different from those in *D'Oench*. This Court has emphasized in *D'Oench* itself, see 315 U.S. at 458-61, and in later decisions that *D'Oench* involved a borrower's attempt to use as a *defense* to liability its own knowing participation in a "secret agreement" that would likely deceive the FDIC as to a specific bank asset. *Langley* v. *FDIC*, 484 U.S. 86, 92 (1987); *United States* v. *Yazell*, 382 U.S. 341, 354 (1966). *D'Oench* specifically stated that the question it addressed was whether "the liability

of [the borrower] *on the note* involves decision of a federal, not a state, question." 315 U.S. at 456. *D'Oench* repeatedly emphasized that it was creating federal common law to address the use of a secret agreement "as a defense" to liability on a note that appeared in the bank's records as a noncontingent asset. *Id.* at 458-61.

Unlike the situation in *D'Oench*, here the FDIC was not and could not have been deceived about an asset of Southeast that involved Hess or Motorcity. Prior to the receivership, Hess had long since paid in full all of Motorcity's obligations to Southeast, and Hess's claim did not affect the amount he had previously owed the bank. Not only was no asset affected, there was also no secret. Hess filed his first complaint prior to Southeast's default and the FDIC's receivership. The only possible information about Hess or Motorcity that could have been useful to the FDIC was that he had filed suit against the bank. Hess had filed and served his complaint—there was no secret.

Moreover, when Congress enacted FIRREA in 1989, the most recent indications from this Court—*Langley* and *Coit*—were that *state law* governed if a borrower's claims were not barred by federal statute. See *supra*, at 10-11. *Langley* and *Coit* demolish any notion that existing federal common law controlled such borrower claims prior to FIRREA.

By barring petitioners' claims, the Eleventh Circuit *extended* what it called the "evolving" *D'Oench* doctrine, App. 24a, and created a new rule of federal common law. Accordingly, the Eleventh Circuit's application of *Texas* is misplaced because this Court has held that it is "difficult to argue," to say the least, that the "speak directly" test applies to "a federal common-law remedy *not yet recognized by this Court.*" *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 327 n.19 (1981) (emphasis added).

2. FIRREA Satisfies Any "Speak Directly" Test.

In all events, FIRREA more than satisfies the "speak directly" test. *First*, as this Court's decision in *Langley* makes plain, *D'Oench* and § 1823(e) speak to the same subject. See *Langley*, 484 U.S. at 92-93. That subject is: When are agreements that are enforceable against the bank not enforceable against the FDIC as successor? Indeed, in its brief in *O'Melveny* to this Court, the FDIC stated that "both Section 1823(e) and *D'Oench, Duhme* address the question of whether a secret side agreement may constitute a defense to an action on a note by FDIC as receiver for an insured financial institution." Brief for the FDIC, at 38 (No. 93-489); see also *id.* at 43 (§ 1823(e) "does overlap the *D'Oench Duhme* doctrine substantially"). This Court has held that far less of an exact congruence satisfies the "speak directly" test. See, *e.g.*, *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 620, 622 (1978) (holding that a provision in a *non*comprehensive statute that " 'recovery . . . shall be a fair and just compensation for the pecuniary loss' " precludes a common law rule that allowed awards for "loss of society") (quoting 46 U.S.C. § 762).[10]

Second, if there was any basis for doubting that § 1823(e) speaks directly and precludes courts from supplementing or altering it with federal common law, that doubt was removed by Congress in 1989 when it enacted

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[10] The "speak directly" test does *not* require that the later statute have "affirmatively proscribed the use of federal common law." *City of Milwaukee*, 451 U.S. at 315; *accord Texas*, 507 U.S. at 534. *See also Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108-09 (1991) (there is *no* requirement of a "clear statement" or "strict construction"). Rather, the "speak directly" test is satisfied by a statute's "natural meaning," *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952), or by an "implication" arising from the traditional tools of statutory interpretation, *Astoria*, 501 U.S. at 110. Here, § 1823(e) satisfies the "speak directly" test because, among other things, § 1823(e) would be "superfluous" if evolving common law *D'Oench* continued to apply. *Id.* at 112.

FIRREA. Most specifically, FIRREA added a significant provision which closes any statutory gaps and obviates any need for federal common law regarding the civil liability of the FDIC. Section 212 of FIRREA, codified at § 1821(d), substantially overhauled the pre-FIRREA § 1821(d), substituting a very detailed statutory scheme for what was formerly a more general paragraph dating from the original Federal Deposit Insurance Act of 1950, Pub. L. No. 81-787, § 11(d), 64 Stat. 873, 884.[11] In particular, 12 U.S.C. § 1821(d)(2)(H) specifically commands that "the Corporation . . . *shall pay all valid obligations of the insured depository institution* in accordance with the prescriptions and limitations *of this chapter*." (Emphases added.) Section 1821(d)(2)(H) allows the FDIC to avoid an obligation of the bank only if a defense is provided by "the prescriptions and limitations *of this chapter*." It is difficult to imagine a plainer statutory instruction against further judicial "evolution" of federal common-law *D'Oench* defenses—a judge-made defense is not a "limitation[] of this chapter." *Id.*

O'Melveny addressed an analogous provision of FIRREA, 12 U.S.C. § 1821(d)(2)(A)(i). Section 1821(d)(2)(A)(i) provides that the FDIC as receiver "shall . . . succeed to . . . all rights, titles, powers, and privileges *of the insured depository institution*." (Emphasis added.) *O'Melveny* held that this provision means that the FDIC succeeds to the bank's "claims *under state law*, except where some provision in the extensive framework of FIRREA provides otherwise." 114 S. Ct. at 2054 (emphasis added). *O'Melveny*'s reasoning also applies to § 1821(d)(2)(H), which ties the FDIC's obligations and defenses to those of the bank at least as clearly

[11] The pre-FIRREA 1821(d) provided that "[the FDIC] . . . shall pay to itself . . . such portion of the amounts realized . . . as it shall be entitled to receive on account of its subrogation to the claim of depositors, and it shall pay to depositors and other creditors the net amounts available for distribution to them." 12 U.S.C. § 1821(d) (1988).

as § 1821(d)(2)(A)(i) does for the FDIC's rights and claims. Therefore, the reasoning in *O'Melveny* leads to "the conclusion that [§ 1821(d)(2)(H)] places the FDIC in the shoes of the insolvent [bank], to [pay its valid obligations] under state law, except where some provision in the extensive framework of FIRREA provides otherwise." 114 S. Ct. at 2054.

A court that desires to create extra defenses for the FDIC outside of those in the statute does so out of whole cloth and in violation of the explicit provisions of § 1821(d)(2)(H). The decision below does great damage to both separation of powers and federalism by effectively writing its own statute that limits the FDIC's obligations as successor "in accordance with the prescriptions and limitations of this chapter *or federal common law*." 12 U.S.C. § 1821(d)(2)(H) (emphasized material added); see App. 24a-26a. Congress certainly knows how expressly to recognize supplementary federal common law when it so desires.[12] It chose not to do so here, and the federal courts have no license to disregard Congress's policy determination.

Third, O'Melveny holds that FIRREA is "comprehensive legislation." 114 S. Ct. at 2054; see also *United States* v. *Winstar Corp.*, 64 U.S.L.W. 4739, 4744 (U.S. July 1, 1996) (No. 95-865) (plurality opinion) ("FIRREA made enormous changes in the structure of federal thrift regulation"); H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1, at 415 (1989) (12 U.S.C. § 1821(d), as amended by FIRREA, is "comprehensive"); S. Rep. No.

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[12] *See, e.g.*, 42 U.S.C. § 6991b(d)(3) ("Nothing in this subsection shall be construed to limit any other State or Federal statutory, contractual, or common law liability of a guarantor to its owner or operator . . ."); *id.* § 9608(d)(2) ("Nothing in this subsection shall be construed to limit any other State or Federal statutory, contractual, or common law liability of a guarantor . . ."); *id.* § 11046(g) ("Nothing in this section shall restrict or expand any right which any person (or class of persons) may have under any Federal or State statute or common law . . .").

19, 101st Cong., 1st Sess. 313 (1989) (12 U.S.C. § 1821(d) is a "common code" of the FDIC's rights as receiver). By definition, "comprehensive" legislation covers a field such that it is the exclusive voice of federal law that speaks to all issues within that field. See *City of Milwaukee*, 451 U.S. at 319 ("comprehensive program" of statutory provisions "strongly suggests that there is no room for courts to attempt to improve on that program with federal common law"); *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 788-89 (1952) (statute displaces prior federal common law when statute lists powers and omits power claimed under prior federal common law). Thus, the very comprehensiveness of FIRREA, particularly on the issues of a receiver's rights and obligations, speaks directly to—and thus displaces—any previously existing federal common law.

3. *The Eleventh Circuit's "Speak Directly" Argument Was Rejected in* O'Melveny.

In the end, the decision below accepts the exact FDIC argument that this Court rejected in *O'Melveny*. In *O'Melveny*, the FDIC conceded that the specific holding of *D'Oench* was limited to "a defense to an action on a note by FDIC as receiver," Brief for the FDIC, at 38 (No. 93-489), but argued that *D'Oench* stood for a broader "doctrine" and "principle" of federal common law. *Id.* at 41. The FDIC further argued that this broader doctrine was not displaced by FIRREA, *id.*, because " '[i]n order to abrogate a common-law *principle*, the statute must 'speak directly' to the question addressed by the common law,' " *id.* at 36 (emphasis added) (quoting *United States* v. *Texas*, 507 U.S. 529, 534 (1993)). *O'Melveny* rejected the FDIC's argument that *D'Oench* created a "principle" far broader than its holding and that this evolving principle was not displaced by FIRREA. Having failed to persuade this Court in *O'Melveny*, the FDIC rehashed the same argument to the Eleventh Circuit, and the Eleventh Circuit incorrectly adopted

it. This conflict, along with the conflict among the courts of appeals, warrants certiorari.

III. IT IS SOUND POLICY TO DISTINGUISH BETWEEN (1) DEFENSES AND CLAIMS REGARDING SPECIFIC ASSETS AND (2) CLAIMS BY PERSONS WHO OWE NOTHING TO THE DEFAULTED BANK.

The plain text of § 1823(e) protects the FDIC only against such agreements that "diminish or defeat the interest of the [FDIC] in any asset." 12 U.S.C. § 1823(e). As this case illustrates, this statutory limitation embodies sound policy. There are greater fiscal consequences for the FDIC when an agreement is raised as a defense to repayment of a specific asset than when a creditor makes an uninsured and unsecured claim.

The fiscal consequences of claims and defenses barred by § 1823(e) differ significantly from permitted claims such as Hess's. Defenses regarding a specific asset usually reduce the insurance fund dollar-for-dollar. For example, if the Langleys had been successful in arguing that they were not obligated to pay off their loan, the FDIC would have lost an asset, and thus the FDIC's payout as insurer would have been increased. See *Langley*, 484 U.S. at 91-92. In contrast, not only did Hess pay off his loan in full, but also he and others similarly situated who have uninsured, unsecured claims do not receive any distribution from the amounts realized from the liquidation or other resolution of the institution unless the FDIC has already repaid itself in full for its payments to insured depositors. 12 U.S.C. §§ 1821(d)(11)(A), 1821(g); see 12 C.F.R. § 360.3(a); *Stattin* v. *RTC*, 883 F. Supp. 678, 681-84 (M.D. Fla.), *aff'd*, 74 F.3d 1252 (11th Cir. 1995). Most important, federal insurance funds do *not* "provide[] an additional pool of assets from which [uninsured and unsecured] claims may be satisfied." *McNeily* v. *United States*, 839 F. Supp. 426, 429 (N.D. Tex. 1992) (citing 12 U.S.C. § 1821(i)(2), which caps the FDIC's liability

to the amount the creditor would have received in liquidation).

Of course, even if § 1823(e) were unwisely narrow, that would provide no warrant for federal courts to alter the statute with judicially-created rules of decision. "The short of the matter is that Congress opted for the certainty of the requirements set forth in § 1823(e)." *Langley*, 484 U.S. at 95. As the court in *City of Milwaukee* held: "Our commitment to the separation of powers is too fundamental to continue to rely on federal common law by judicially decreeing what accords with common sense and the public weal when Congress has addressed the problem." 451 U.S. at 315 (internal quotation marks omitted) (quoting *TVA* v. *Hill*, 437 U.S. 153, 195 (1978)); see also *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 644-46 (1981) ("regardless of the merits of conflicting arguments" the resolution of policy disputes "is a matter for Congress, not the courts"). *Cf.* App. 26a (acknowledging that courts "apply the common law *D'Oench* doctrine beyond the confines of the statutory language").

In enacting FIRREA, Congress sought to provide protection from agreements that impair collection of specific assets. The *D'Oench* decision itself was designed as a shield to protect the insurer's reliance on the bank's specific assets, not as a sword to extinguish ordinary uninsured and unsecured obligations: "[t]he bank's gardener, window washer and garbage collector have a claim for services rendered whether or not they had written contracts." *Ramins & Sons, Inc.* v. *RTC*, 1993 WL 210551, at *2 (E.D. Pa. June 15, 1993). Nevertheless, despite FIRREA, the FDIC continues to attack claimants, such as Hess, with the federal common-law sword of "evolving" *D'Oench*. Although this Court has held that "there is no federal policy that the fund should always win," *O'Melveny*, 114 S. Ct. at 2055, the Eleventh Circuit decision seeks to tilt the playing field improperly in the FDIC's

favor.[13] As the D.C. Circuit and the Eighth Circuit have recognized, *D'Oench* may not properly be used to alter the balance set by Congress in the comprehensive FIRREA and particularly in 12 U.S.C. § 1823(e). Because the Court below failed to accord proper respect to Congress's actions, petitioners respectfully request this Court to grant certiorari, resolve the conflicts among the circuits, and reverse the judgment of the Eleventh Circuit.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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[13] FIRREA itself recognizes that federal law does not always permit the FDIC to have "more money." *O'Melveny*, 114 S. Ct. at 2055. Thus, although FIRREA specifically authorizes the FDIC to repudiate certain burdensome contracts, 12 U.S.C. § 1821(e)(1), it also requires payment of compensatory damages, *id.* § 1821(e)(3), and requires that the FDIC pay other valid obligations, *id.* § 1821(d)(2)(H); *see* H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1, at 331 (1989).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 93-4634

MOTORCITY OF JACKSONVILLE, LTD., a limited partnership, By and Through its general partner MOTORCITY OF JACKSONVILLE, INC., a Florida corporation, David S. Hess,
Plaintiffs-Appellants,

v.

SOUTHEAST BANK N.A., David Feigenbaum,
Defendants,

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for SOUTHEAST BANK, N.A.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

May 8, 1996

Before TJOFLAT, Chief Judge, and KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges.

ANDERSON, Circuit Judge:

I. INTRODUCTION

In this decision, we consider whether the district court correctly granted a motion to dismiss in favor of appellee

Federal Deposit Insurance Corporation ("FDIC") based upon the *D'Oench* doctrine. *See D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). For the reasons that follow, we affirm the judgment of the district court.

II. FACTS

This case arises from the banking relationship of appellants Motorcity of Jacksonville, Ltd., Motorcity of Jacksonville, Inc., and David S. Hess (collectively "Motorcity")[1] with the financial institution of Southeast Bank, N.A. ("Southeast"). We assume the following allegations from Motorcity's pleadings to be true for purposes of resolving the FDIC's motion to dismiss. In 1986, Motorcity and Southeast negotiated a floor plan financing agreement, under which Southeast agreed to lend Motorcity funds to purchase inventory for its used car dealership. During the negotiations, Motorcity orally informed Southeast that appellant David Hess and other Motorcity investors lacked experience in running a car dealership and planned to operate the dealership as absentee owners. Southeast orally assured Motorcity that its personnel were experienced with floor plan financing and that "the bank 'knew what it was doing.'" R2-58 Ex. 1 ¶ 14. Of particular concern to both Southeast and Motorcity were "out-of-trust" sales, which occur whenever a dealership fails to use the proceeds from the sale of a vehicle to repay the loan designated for that vehicle. Continued unchecked, such out-of-trust sales could pose a threat to a dealership's financial viability.

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[1] Motorcity of Jacksonville, Ltd., was a limited partnership engaged in the business of selling used vehicles in Duval County, Florida. Motorcity of Jacksonville, Inc., a Florida corporation, was the limited partnership's general partner. David S. Hess, a Jacksonville cardiologist, was the president and a principal shareholder of Motorcity of Jacksonville, Inc.

Motorcity and Southeast executed a written floor plan financing agreement in June 1987. Pursuant to the floor plan financing agreement, Southeast retained the right to audit Motorcity's records.[2] Southeast hired an independent contractor to audit Motorcity on a monthly basis. Through these audits, Southeast allegedly discovered a pattern of out-of-trust sales at the dealership: rather than repaying the floor plan loans, Motorcity's managers were using the sales proceeds from vehicles to pay themselves unearned bonuses. Although Southeast or its auditor sent summary audit reports to Motorcity, the bank failed to disclose these out-of-trust sales to Motorcity.

In February 1989, Motorcity learned from its newly-hired general manager that the dealership was out-of-trust more than $400,000. Motorcity immediately notified Southeast of the situation. Southeast demanded immediate payment for the entire out-of-trust amount, but Motorcity was unable to meet the bank's demand. Southeast took possession of Motorcity's collateral, including the dealership itself and $375,000 in certificates of deposit. Motorcity repaid all of its loans to Southeast by April 1990.

III. PROCEEDINGS BELOW

Motorcity sued Southeast and one of its employees in Florida state court, alleging breach of fiduciary duty, breach of oral contract, and negligence. Less than a year later, in September 1991, the Office of the Comptroller of the Currency declared Southeast insolvent and ap-

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[2]In the written agreement, Motorcity made the following affirmative covenant to Southeast:

> [Motorcity] will keep and maintain full and accurate accounts and records of its operations . . . and will permit [Southeast] and its designated officers, employees, agents and representatives, to have access thereto and to make examination thereof at all reasonable times, to make audits, and to inspect and otherwise check its properties, real, personal and mixed.

R1-35 Ex. B. ¶ 5.7.

pointed the FDIC as receiver for the failed bank. The FDIC was substituted for Southeast as defendant in the state court action, and the FDIC removed the case to federal court.

Motorcity amended its complaint to state a claim only for breach of written contract. The district court dismissed this amended complaint for failure to state a claim upon which relief could be granted. The court found that the floor plan financing agreement gave Southeast the right, but not the duty, to audit Motorcity; thus Southeast was under no contractual obligation to inform Motorcity of the out-of-trust sales. The court further ruled that the *D'Oench* doctrine and 12 U.S.C. § 1823(e)(1) required any agreement between a failed financial institution and its customer to be in writing; consequently, any claims for breach of oral contract were barred. Finally, the court held that the *D'Oench* doctrine also foreclosed Motorcity's putative tort claims. The court reasoned that "[t]he genesis of this action is the Southeast floor plan financing agreement, whose written provisions do not support a breach of contract claim against the FDIC. No amount of artful pleading, including further amendments to the complaint, can alter this result." R2-52-8.

Motorcity moved for a rehearing and for leave to amend its complaint to add tort claims for negligence and for breach of fiduciary duty to notify. The district court denied both motions. In its omnibus order, the court reiterated that the *D'Oench* doctrine barred all oral contract claims, including those claims recast as tort actions by " 'artful pleading.' " R2-67-1-2.

On appeal, a panel of this court held that Motorcity's state law tort claims for negligence and for breach of fiduciary duty were free standing torts, not barred by the *D'Oench* doctrine. *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 39 F.3d 292 (11th Cir.1994). The FDIC's petition for en banc hearing was granted, thus

vacating the panel opinion. 58 F.3d 589 (11th Cir. 1995).[3]

IV. STANDARD OF REVIEW[4]

Motorcity appeals solely the district court's denial of its motion to file a second amended complaint to add its proposed tort claims. Our review standard for a district court's denial of a motion to amend a complaint is abuse of discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S.Ct. 795, 802, 28 L.Ed.2d 77 (1971); *Shipner v. Eastern Air Lines, Inc.*, 868 F.2d 401, 407 (11th Cir.1989). After a responsive pleading has been filed, subsequent amendments are permissible only with leave of court, which "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). This liberal policy of allowing amendments under Rule 15(a) "circumscribes the exercise of the district court's discretion; thus, unless a substantial reason exists to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Shipner*, 868 F.2d at 407; *see also Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993) (holding that "a justifying reason *must be apparent* for denial of a "motion to amend") (emphasis added).

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[3] Part IIA of the panel opinion was not reconsidered by the en banc court and is REINSTATED, with the exception of the last sentence.

It is clear that the district court had jurisdiction for several reasons including the "deemer" clause, 12 U.S.C. § 1819(b)(2)(A), and the removal clause, *id.* § 1819(b)(2)(B), pursuant to which the district court properly allowed the FDIC to remove the case to federal court. The exception to federal jurisdiction provided by 12 U.S.C. § 1819(b)(2)(D) does not apply because Southeast was a national bank, not a state chartered institution, because a federal authority, not a state authority, appointed the FDIC as receiver of Southeast, and because the interpretation of federal law (i.e., the *D'Oench* doctrine and its statutory counterparts) is necessary to decide this case.

[4] This Part substantially adopts the panel opinion's statement of the standard of review.

In this case, the district court denied Motorcity's motion to amend based on the court's legal determination that Motorcity's proposed tort claims were barred by the *D'Oench* doctrine. The futility of a proposed amended complaint can be a justifiable reason for denying leave to amend. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *Moore*, 989 F.2d at 1131. When a district court denies leave to amend a complaint because of futility, we review *de novo*. *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341, 1348 (6th Cir.1993); *see also In re Geri Zahn, Inc.*, 25 F.3d 1539, 1542 (11th Cir.1994) (explaining that the applicability of the *D'Oench* doctrine is a question of law, subject to *de novo review*); *Freer v. Dugger*, 935 F.2d 213, 216 (11th Cir.1991) ("Regarding the standard of review, conclusions of law by the district court are not binding on appellate courts and this court is free to substitute its judgment for the district court's on matters of law.") Accordingly, we review *de novo* the district court's determination that Motorcity's tort claims are barred by the *D'Oench* doctrine and its statutory counterpart, 12 U.S.C. § 1823(e)(1).

V. DISCUSSION

Our analysis begins with an examination of the *D'Oench* doctrine's origins and with the leading case itself, *D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956 (1942). In that case, the Supreme Court created a federal common law doctrine of estoppel to protect the FDIC from defenses raised by debtors based on "secret agreements" with failed banks. *D'Oench* involved a securities dealer who sold a bank some bonds which later became worthless. To prevent the past due bonds from appearing among the assets of the bank, the dealer executed a demand note with the bank and entered into a separate agreement with the bank that the note would not be called for payment. The FDIC later acquired the note in a purchase and assumption transaction. When the FDIC demanded payment on

the note, the maker defended on the basis of the side agreement with the bank, in which the bank promised not to call the note for payment. *Id.* at 454, 62 S.Ct. at 678. The lower courts applied Illinois state law and held that the FDIC was entitled to recover on the note as a "holder in due course." *Id.* at 455, 62 S.Ct. at 678.

The Supreme Court rejected the lower courts' use of state law and instead created a federal common law rule by drawing an analogy to provisions of the Federal Reserve Act, which "reveal[ed] a federal policy to protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures or to which it makes loans." *Id.* at 457, 62 S.Ct. at 679. The Court held that a "secret agreement" outside the documents contained in the bank's records would not operate as a defense against a suit by the FDIC on the note. *Id.* at 459, 62 S.Ct. at 680. Significantly, the Court added that the maker of the note did not have to intend to deceive anyone; it was sufficient "that the maker lent himself to a scheme or arrangement whereby the banking authority . . . was likely to be misled." *Id.* at 460, 62 S.Ct. at 681.

Eight years later, Congress partially codified the holding in *D'Oench* was section 2(13)(e) of the Federal Deposit Insurance Act of 1950, 64 Stat. 873, 889, as amended, 12 U.S.C. § 1823(e)(1), which provided:

> No agreement which tends to diminish or defeat the right, title or interest of the Corporation [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board

> of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.[5]

Thus, "[t]he statute makes the common law principle both more encompassing and more precise." *FDIC v. O'Neil*, 809 F.2d 350, 353 (7th Cir.1987). By allowing the FDIC to rely on the records of the bank, the specific recording requirements of § 1823(e) enable the FDIC to determine quickly whether to engage in a purchase and assumption transaction, or whether to liquidate the failed bank and pay off insured deposits.[6] The Supreme Court explained:

> [This] evaluation, in particular, must be made "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services." Neither the

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[5] As originally enacted in 1950, § 1823(e) also included a paragraph that authorized the FDIC to engage in purchase and assumption transactions. This paragraph was moved to 12 U.S.C. § 1823(c) by the Garn-St. Germain Depository Institutions Act of 1982, Pub.L. No. 97-320, 96 Stat. 1469 (1982).

[6] When a bank fails, the FDIC acts simultaneously in two capacities: the receiver capacity ("FDIC-Receiver") and the corporate capacity ("FDIC-Corporate"). The corporate capacity of the FDIC refers to its role as the insurer of back deposits. Rather than liquidating a bank when it fails, the FDIC whenever feasible employs a purchase and assumption transaction. In a purchase and assumption transaction, the FDIC-Receiver sells the failed bank as a going concern to a financially sound bank, in return for the purchasing bank's promise to assume all the failed bank's deposit liabilities. Unacceptable assets remain with the FDIC-Receiver. FDIC-Corporate then purchases the unacceptable assets with insurance funds, and attempts to collect on the unacceptable assets to minimize the FDIC's losses. *See generally Gunter v. Hutcheson*, 674 F.2d 862, 865-66 (11th Cir.) (explaining the mechanics of a purchase and assumption transaction), *cert. denied*, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982).

> FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions.

Langley v. FDIC, 484 U.S. 86, 91-92, 108 S.Ct. 396, 401, 98 L.Ed.2d 340 (1987) (quoting *Gunter v. Hutcheson*, 674 F.2d 862, 865 (11th Cir.), *cert. denied*, 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982) (citations omitted)). In addition to requiring an alleged agreement to appear in the bank's records, § 1823(e) requires the agreement to "have been executed 'contemporaneously' with the making of the note and to have been approved by officially recorded action of the bank's board or loan committee." *Id.* at 92, 108 S.Ct. at 401. The Court explained:

> These . . . requirements ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure.

Id. However, it is "clear that the *D'Oench* doctrine applies even where the customer is completely innocent of any bad faith, recklessness, or negligence." *Baumann v. Savers Fed. Sav. & Loan Ass'n*, 934 F.2d 1506, 1515 (11th Cir.1991), *cert. denied*, 504 U.S. 908, 112 S.Ct. 1936, 118 L.Ed.2d 543 (1992). Thus, § 1823(e) and the *D'Oench* doctrine encourage "banks and their customers [to] include the entire extent of their obligations in the bank's records." *Id.; see also Bell & Murphy & Assoc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 754 (5th Cir.) ("The *D'Oench, Duhme* doctrine . . . favors the interests of depositors and creditors of a failed bank, who cannot protect themselves from secret agreements, over the interests of borrowers, who can."), *cert. denied*, 498 U.S. 895, 111 S.Ct. 244, 112 L.Ed.2d 203 (1990); *In re NBW Commercial Paper Litigation*, 826 F.Supp. 1448, 1461-62 (D.D.C. 1992) (describing

D'Oench and § 1823(e) as "a regime that places the risk on borrowers if they do not get all of the terms of their agreements in writing").

As originally enacted in 1950, § 1823(e)(1) paralleled the facts of the *D'Oench* case itself: it applied only to the FDIC in its corporate capacity when it purchased bank assets from its receivership division. *Vernon v. RTC*, 907 F.2d 1101, 1105 (11th Cir.1990). However, the federal policy expressed in the *D'Oench* decision "applies in virtually all cases where a federal depository institution regulatory agency is confronted with an agreement not documented in the institution's records." *OPS Shopping Ctr., Inc. v. FDIC*, 992 F.2d 306, 308 (11th Cir. 1993) (quoting *Baumann*, 934 F.2d at 1510). Courts therefore applied the federal common law *D'Oench* doctrine to protect certain entities not covered by the language of § 1823 (e)(1)—including, for example, the FDIC as receiver, the Federal Savings and Loan Insurance Corporation ("FSLIC"), and transferees of assets (such as bridge banks) from banking regulatory agencies. *See, e.g., FSLIC v. Two Rivers Assocs., Inc.*, 880 F.2d 1267, 1274, 1276-77 (11th Cir.1989) (holding that the federal common law *D'Oench* doctrine protects the FSLIC and the FDIC in both receiver and corporate capacities); *Newton v. Uniwest Fin. Corp.*, 967 F.2d 340, 347 (9th Cir. 1992) (extending the *D'Oench* doctrine to a private bank, as the FSLIC's successor-in-interest in a note); *Timberland Design, Inc. v. First Serv. Bank for Sav.*, 932 F.2d 46, 49 (1st Cir.1991) (per curiam) citing cases for the proposition that "courts have consistently applied the [*D'Oench*] doctrine to those situations where the FDIC was acting in its capacity as receiver"); *Kilpatrick v. Riddle*, 907 F.2d 1523, 1528 (5th Cir.1990) (extending the *D'Oench* doctrine to the FDIC's assignee, a bridge bank), *cert. denied sub nom. Rogers v. FDIC*, 498 U.S. 1083, 111 S.Ct. 954, 112 L.Ed.2d 1042 (1991); *Porras v. Petroplex Sav. Ass'n*, 903 F.2d 379, 381 (5th Cir. 1990) (extending the *D'Oench* doctrine's protection to

transferees of assets from the FSLIC in purchase and assumption transactions); *FDIC v. First Nat'l Fin. Co.*, 587 F.2d 1009, 1012 (9th Cir.1978) (rejecting the argument that the *D'Oench* doctrine does not apply to the FDIC as receiver). Courts also applied the *D'Oench* bar to secret agreements between borrowers and a subsidiary of the failed financial institution under the regulatory agency's control. *See Victor Hotel Corp. v. FCA Mortg. Corp.*, 928 F.2d 1077, 1083 (11th Cir.1991); *Robinowitz v. Gibraltar Sav.*, 23 F.3d 951, 956 (5th Cir.1994) (holding that *D'Oench* applies to secret side agreements made by subsidiaries and subsidiaries of the failed institution in receivership), *cert. denied*, —— U.S. ——, 115 S.Ct. 725, 130 L.Ed.2d 630 (1995); *Sweeney v. RTC*, 16 F.3d 1, 4 (1st Cir.) (per curiam) (holding that the *D'Oench* doctrine extends to claims involving a wholly owned subsidiary of the failed financial institution in receivership), *cert. denied*, —— U.S. ——, 115 S.Ct. 291, 130 L.Ed.2d 206 (1994); *Oliver v. RTC*, 955 F.2d 583, 585-86 (8th Cir.1992) (holding that the "*D'Oench* doctrine extends broadly to cover any secret agreement adversely affecting the value of a financial interest that has come within the RTC's control as receiver of a failed financial institution" including the financial interest of a wholly-owned subsidiary). Furthermore, as originally enacted, § 1823(e)(1) generally applied only to preclude defenses raised by borrowers to avoid repaying their loans. *Thigpen v. Sparks*, 983 F.2d 644, 647-48 (5th Cir.1993). Courts applied the federal common law *D'Oench* doctrine to bar the assertion of affirmative claims against the FDIC, including claims sounding in tort. *See RTC v. Dunmar Corp.*, 43 F.3d 587, 595 (11th Cir.) (en banc) (holding that "*D'Oench* bars defenses and affirmative claims whether cloaked in terms of contract or tort, as long as those claims arise out of an alleged secret agreement" (quoting *Timberland*, 932 F.2d at 50)), *cert. denied sub nom. Jones v. RTC*, —— U.S. ——, 116 S.Ct. 74, 133 L.Ed.2d 33 (1995); *Beighley v. FDIC*, 676 F.Supp.

130, 132 (N.D.Tex.1987) ("To allow a claim *against* the FDIC asserting the very grounds that could not be used as a defense to a claim *by* the FDIC is to let technicality stand in the way of principle."), *on reh'g*, 679 F.Supp. 625 (N.D.Tex.1988), *aff'd*, 868 F.2d 776 (5th Cir.1989). In *Dunmar*, we reiterated this circuit's *D'Oench* rule, which reflects the judicial extensions of the doctrine over the years:

> In a suit over the enforcement of an agreement originally executed between an insured depository institution and a private party, a private party may not enforce against a federal deposit insurer any obligation not specifically memoralized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution's records.

Id. at 593 (quoting *OPS*, 992 F.2d at 308 and *Baumann*, 934 F.2d at 1515).[7]

In the wake a mounting crisis in the banking and thrift industry, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. No. 101-73, 103 Stat. 183, *inter alia*, "to give the FDIC power to take all actions necessary to resolve the problems posed by a financial institution in default." *FDIC v. Wright*, 942 F.2d 1089, 1095-96 (7th Cir.1991) (quoting H.R.Rep. No. 54(I), 101st

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[7] Courts that expanded the *D'Oench* doctrine often applied the common law and § 1823(e)(1) in tandem, reasoning that "the purposes of *D'Oench* and section 1823(e) were the same, and therefore . . . the same analysis [applied] regardless of whether the party involved in the case was the FDIC or another federal banking regulator." *Baumann*, 934 F.2d at 1515. Cases interpreting either common law *D'Oench* or § 1823(e)(1) were both considered precedent. *Id.* In the only Supreme Court decision directly addressing § 1823(e), the Court unanimously agreed that the statute should be interpreted broadly, so as not "to disserve the principle of [*D'Oench*]." *Langley v. FDIC*, 484 U.S. 86, 92-93, 108 S.Ct. 396, 402, 98 L.Ed.2d 340 (1987).

Cong., 1st Sess. 330, *reprinted in* 1989 U.S.Code Cong. & Admin.News 126), *cert. denied*, 504 U.S. 909, 112 S.Ct. 1937, 118 L.Ed.2d 544 (1992). FIRREA substantially codified several of the significant common law developments in the *D'Oench* doctrine, expanded the applicability of § 1823(e) to the FDIC in its receivership capacity,[8] to the newly-created Resolution Trust Corporation (RTC) in either its corporate or receivership capacity,[9] and to bridge banks.[10] FIRREA also added 12 U.S.C. § 1821(d)(9)(A), which explicitly extends the protection of § 1823(e) to affirmative claims against the banking authority. It provides that "any agreement which does not meet the requirements set forth in § 1823(e) . . . shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation." The substance of § 1823(e)—i.e., the range of secret agreements prohibited by the statute—was left untouched.[11]

Motorcity makes several arguments in its effort to prevent the application of the *D'Oench* doctrine to its claims against the FDIC. First, Motorcity argues that the federal common law *D'Oench* doctrine has been preempted by statute and that therefore the FDIC must rely exclusively on §§ 1821(d)(9)(A) and 1823(e)(1), the statutory cousins of the *D'Oench* doctrine. Second, Motorcity argues that §§ 1821(d)(9)(A) and 1823 (e)(1)

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[8] Section 217(4) of FIRREA expanded the applicability of § 1823(e) to the FDIC in its receiver capacity by adding the words "or as receiver of any insured depository institution." 1989 U.S. Code Cong. & Admin.News (103 Stat.) 183, 256.

[9] 12 U.S.C. § 1441a(b)(4)(A) (Supp. V 1993) (superseded) granted the RTC powers similar to those enjoyed by the FDIC, including the power to invoke § 1823(e).

[10] 12 U.S.C. § 1821(n)(4)(I) protects bridge banks with language borrowed from § 1823(e).

[11] FIRREA made minor amendments to § 1823(e) by deleting the words "right, title and" from before the word "interest" and by changing the verbs in the subparagraphs to the present tense.

bar only those claims that impair the FDIC's interest in a specific bank asset. Because Motorcity paid off its loan to Southeast before the FDIC's appointments as receiver, Motorcity argues that these statutory provisions do not apply to its claims. Third, Motorcity argues that its claims against the FDIC are "free standing tort claims," which are not barred by the *D'Oench* doctrine. Finally, even if the D'Oench doctrine prevents any reliance on oral agreements or representations, Motorcity suggests that its state law tort claims are still viable. We address each of Motorcity's arguments in turn.

A. *Has the Federal Common Law D'Oench Doctrine Been Prempted by Statute?*

We first address Motorcity's argument that the federal common law *D'Oench* doctrine has been preempted by statute. In *Murphy v. FDIC*, 61 F.3d 34 (D.C.Cir. 1995), the D.C. Circuit recently held that the Supreme Court's reasoning in *O'Melveny & Myers v. FDIC*, —— U.S. ——, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994), leads "ineluctably" to the conclusion that the common law *D'Oench* doctrine has been preempted. *Id.* at 38; *see also DiVall Insured Income Fund Ltd. Partnership v. Boatmen's First Nat'l Bank of Kansas City*, 69 F.3d 1398, 1402 (8th Cir.1995) (following *Murphy*'s reasoning and holding that the federal holder in due course and *D'Oench* doctrines have been preempted). We disagree with the analysis of the D.C. and the Eighth Circuits and hold that the federal common law *D'Oench* doctrine has not been preempted by statute.

Our analysis of the preemption issue begins with a discussion of the effect of federal statutes on the federal common law, in light of the role that the federal common law plays in our system. In *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19, 10 L.Ed. 865 (1842), the Supreme Court held that, in the absence of a state statutory or constitutional provision, federal court's sitting in diversity

should not apply a state court's common law decisions. Rather, federal courts should fashion their own federal common law rules by consulting "the general principles and doctrines of . . . jurisprudence." *Id.* at 19. Almost a century later in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-80. 58 S.Ct. 817, 822-23, 82 L.Ed. 1188 (1938), the Supreme Court expressly overruled *Swift*, holding unconstitutional the federal common law regime created by that decision. Writing for the Court, Justice Brandeis flatly declared: "There is no federal general common law." The Court explained that the *Swift* doctrine represented an unconstitutional invasion by the federal courts into the powers "reserved by the Constitution to the several states." *Id.* at 79-80, 58 S.Ct. at 823.

However, the holding in *Erie* did not destroy all types of federal common law. Since *Erie*, the Supreme Court "has recognized the need and authority in some limited areas to formulate what has come to be known as 'federal common law.'" *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 101 S.Ct. 2061, 2067, 68 L.Ed.2d 500 (1981). In particular, federal courts have created and applied federal common law when necessary to protect certain "uniquely federal interests." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504, 108 S.Ct. 2510, 2514, 101 L.Ed.2d 442 (1988) (holding that federal common law governs the tort liability of a helicopter manufacturer to a deceased pilot, where the manufacturer supplies the helicopters to the federal government); *see also United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-27, 99 S.Ct. 1448, 1457, 59 L.Ed.2d 711 (1979) (holding that the priority of liens stemming from federal lending programs is a matter of federal common law); *Howard v. Lyons*, 360 U.S. 593, 597, 79 S.Ct. 1331, 1333-34, 3 L.Ed.2d 1454 (1959) (creating a federal common-law privilege that protects federal officers from libel and defamation suits arising out of statements made in the course of duty); *Clearfield Trust Co. v.*

United States, 318 U.S. 363, 366, 63 S.Ct. 573, 575, 87 L.Ed. 838 (1943) (holding that the rights and duties of the United States on commercial paper which it issues are governed by federal law and that "[i]n the absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards").[12]

Courts often examine the policies expressed by Congress in statutes in order to identify those "uniquely federal interests" that make necessary the development of federal common law. *See, e.g., Kimbell Foods*, 440 U.S. at 727, 99 S.Ct. at 1458 (describing federal common law as a means to "fill the interstices of federal legislation"); *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187 (1973) (refusing to apply state law to abrogate federal government contracts to acquire land for public use, in part because doing so "would deal a serious blow to the

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[12] There are other categories of federal common law in addition to the type created to protect "uniquely federal interests." For example, federal common law operates to resolve disputes between state governments. *See, e.g., Illinois v. City of Milwaukee*, 406 U.S. 91, 103, 92 S.Ct. 1385, 1392, 31 L.Ed.2d 712 (1972) ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law."); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 811, 82 L.Ed. 1202 (1938) ("[W]hether the water of an interstate stream, must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either state can be conclusive."). Federal common law also operates in areas "in which Congress has given the courts the power to develop substantive law." *Texas Indus.*, 451 U.S. at 640, 101 S.Ct. at 2067. *See, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110, 109 S.Ct. 948, 954, 103 L.Ed.2d 80 (1989) ("[C]ourts are to develop a federal common law of rights and obligations under ERISA plans." (citation and internal quotation omitted)); *Nat'l Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 688, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637 (1978) (holding that Congress expected the courts to "give shape" to the Sherman Act's broad mandate "by drawing on common-law tradition").

congressional scheme contemplated by the Migratory Bird Conservation Act and indeed all other federal land acquisition programs"). In these cases, the use of federal common law effectuates congressional intent and resembles the task of statutory interpretation.[13] The *D'Oench* case itself is a leading example of the Court's use of federal interests" that require the creation of federal common law. *See D'Oench*, 315 U.S. at 456-57, 62 S.Ct. at 679 (analyzing statutory provisions that "reveal a federal policy to protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures").[14]

Because the application of federal common law is so closely tied to congressional intent, the task of determining whether a particular federal statute displace federal

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[13] *See* Peter Westen and Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 Mich.L.Rev. 311, 332 (1980) ("The difference between 'common law' and 'statutory interpretation' is a difference in emphasis rather than a difference in kind. The more definite and explicit the prevailing legislative policy, the more likely a court will describe its lawmaking as statutory interpretation; the less precise and less explicit the perceived legislative policy, the more likely a court will speak of common law. The distinction, however, is entirely one of degree.").

[14] In a famous concurring opinion in *D'Oench*, Justice Jackson justified the development of federal common law as a means to implement federal statutes. He wrote:

> The federal courts have no *general* common law, as in a sense they have no general or comprehensive jurisprudence of any kind, because many subjects of private law which bulk large in the traditional common law are ordinarily within the province of the states and not of the federal government. But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law or that when we have fashioned an answer it does not become part of the federal non-statutory or common law.

D'Oench, 315 U.S. at 469, 62 S.Ct. at 685 (Jackson, J., concurring).

common law requires courts to inquire carefully into the purposes of the legislation. Courts must be mindful that "the federal lawmaking power is vested in the legislative, not the judicial branch of government," *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 95, 101 S.Ct. 1571, 1582, 67 L.Ed.2d 750 (1981), and that federal common law is often merely a "necessary expedient" in instances in which "Congress has not spoken to a *particular* issue." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-14, 101 S.Ct. 1784, 1790-91, 68 L.Ed.2d 114 (1981) ("*Milwaukee II*") (emphasis added). Accordingly, courts should not require from Congress "the same sort of evidence of a clear and manifest purpose" to preempt as they require in considering whether a federal statute displaces state law. *Id.* at 316-17, 101 S.Ct. at 1792.[15] At the same time, "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534, 113 S.Ct. 1631, 1634, 123 L.Ed.2d 245 (1993) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952)). Therefore, although "Congress need not 'affirmatively proscribe' the common law doctrine at issue," its purpose to preempt existing federal common law at a minimum must be "evident." *Texas*, 507 U.S. at 534, 113 S.Ct. at 1634-35.

In *Murphy*, without mentioning the presumption that federal common law principles survive the enactment of federal legislation, the D.C. Circuit held that FIRREA's

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[15] In considering whether federal legislation preempts state law, the Supreme Court assumes "that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 316, 101 S.Ct. at 1792 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947))).

comprehensive nature caused the federal common law *D'Oench* doctrine to disappear. 61 F.3d at 40. The court reached this startling conclusion by relying almost exclusively on certain language in the Supreme Court's decision in *O'Melveny & Myers v. FDIC*, —— U.S. ——, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994). We disagree with *Murphy*'s reliance on *O'Melveny*.

In *O'Melveny*, the FDIC as receiver for a failed savings and loan (S & L) brought a malpractice lawsuit against the S & L's former law firm, stating causes of action under California law for professional negligence and breach of fiduciary duty. *Id.* at ——, 114 S.Ct. at 2052. The FDIC alleged that the law firm failed to inform the S & L of the illegal acts of the S & L's controlling officers. *Id.* The law firm defended by arguing that, under California law, knowledge of the conduct of the S & L's controlling officers must be imputed to the S & L, and hence to the FDIC, which, as receiver, stood in the S & L's shoes. The FDIC urged the Supreme Court to create a new federal common law rule to govern the imputation of knowledge to the FDIC. *See id.*

The Supreme Court began by stating that it "would [not] adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left to the disposition provided by state law." *Id.* at ——, 114 S.Ct. at 2504. The Court analyzed 12 U.S.C. § 1821 (d)(2)(A)(i), as amended by FIRREA, which defines the powers and duties of the FDIC as receiver by providing that the FDIC "shall . . . by operation of law, succeed to—all rights, titles, powers, and privileges of the insured depository institution. . . ." The Court construed § 1821 (d)(2)(A)(i) as an exclusive grant of rights to the FDIC as receiver and thus held that it could not be "supplemented or modified by federal common law." *Id.* To support this conclusion, the Court listed several "provisions of FIRREA which specifically create special fed-

eral rules of decision regarding claims by, and defenses against the FDIC as receiver." *Id.* The statute having carved out specific areas of federal interest to be subject to federal rules, the Court inferred "*[i]nclusio unius, exclusio alterius.*" *Id.*

Although *O'Melveny* never mentions the *D'Oench* doctrine directly, the Court included one of *D'Oench*'s statutory cousins—§ 1821(d)(9)(A)— in its list of special federal rules of decision. In *Murphy*, the D.C. Circuit concluded that the Supreme Court "necessarily decided the *D'Oench* question" by including § 1821(d)(9)(A) in this list. 61 F.3d at 39. The court in *Murphy* explained that "the inclusion of § 1821(d)(9) in the FIRREA implies the exclusion of overlapping federal common law defenses not specifically mentioned in the statute —of which the *D'Oench* doctrine is one." *Id.*

We believe that *Murphy* erred in relying on *O'Melveny*. The question presented in *O'Melveny* was whether the federal courts should *create* a *new* federal common-law doctrine in an area in which Congress had not expressed any special concern, nor indicated that a special federal rule of decision should govern.[16] In this case, the question presented is not whether a *new* rule should be invented,

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[16] *See O'Melveny*, —— U.S. at ——, 114 S.Ct. at 2054 ("In answering the central question of displacement of California law, we of course would not contradict an explicit federal statutory provision. Nor would we *adopt* a court-made rule to supplement federal statutory regulation that is comprehensive and detailed. . . . To *create additional* 'federal common law' exceptions is not to 'supplement' this scheme, but to alter it."); *id.* at ——, 114 S.Ct. at 2055 ("[E]ven assuming the inapplicability of FIRREA this is not one of those cases in which judicial *creation* of a special federal rule would be justified. . . . Even less persuasive—indeed, positively probative of the dangers of respondent's facile approach to federal-common-law-*making*—is respondent's contention that [California's rule of decision] would disserve the federal program. . . ."); *id.* at ——, 114 S.Ct. at 2056 ("We conclude that this is not one of those extraordinary cases in which the judicial *creation* of a federal rule of decision is warranted."). (All emphasis added).

but whether Congress intended to abrogate the previously-established federal common-law *D'Oench* doctrine, which doctrine operates in an area of special federal concerns as recognized by Congress, the Supreme Court, and the lower federal courts. The *O'Melveny* analysis does not apply to this question.

We believe that *United States v. Texas,* 507 U.S. 529, 113 S.Ct. 1631, 123 L.Ed.2d 245 (1993), rather than *O'Melveny,* provides the appropriate guidance for courts in their efforts to determine whether Congress intended that FIRREA abrogate the previously-established and longstanding federal common-law *D'Oench* doctrine. Just a year before *O'Melveny,* the Supreme Court in *Texas* addressed the question of whether Congress intended to abrogate a pre-existing and longstanding federal common-law doctrine. There, the Court held that the previously-established federal common-law doctrine was presumed to survive unless a congressional intent to the contrary was evident. The Court expressly rejected the argument that the "presumption favoring retention of existing law is appropriate only with respect to state common law." The Court explained:

> [T]here is no support in our cases for the proposition that the presumption has no application to federal common law. . . . "[C]ourts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.'"

Id. at 534, 113 S.Ct. at 1634-45 (quoting *Astoria Fed. Sav. and Loan Ass'n v. Solimino,* 501 U.S. 104, 108, 111 S.Ct. 2166, 2170, 115 L.Ed.2d 96 (1991) (quoting *Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed.2d 1294 (1952))).

Motorcity attempts to overcome the presumption that the federal common law *D'Oench* doctrine survived

FIRREA by arguing that Congress' "evident" purpose was to displace the *D'Oench* doctrine. Motorcity points out that FIRREA is a comprehensive piece of legislation, and contends that §§ 1821(d)(9)(A) and 1823(e)(1) displace the *D'Oench* doctrine because those statutes "speak directly" to some of the questions previously addressed by the federal common law.

In ascertaining whether the purpose of FIRREA was to eliminate the *D'Oench doctrine,* Motorcity is correct in suggesting that we should attach significance to the comprehensiveness of the statutory scheme, and give full recognition to the fact that federal common law is subject to the paramount authority of Congress. *Milwaukee II,* 451 U.S. at 313, 101 S.Ct. at 1791. In some cases, the application of federal common law might interfere with a statutory scheme that is comprehensive in scope. *See, e.g., id.* at 317, 326, 101 S.Ct. at 1792, 1797 (describing the 1972 amendments to the Federal Water Pollution Control Act as a "comprehensive regulatory program supervised by an expert administrative agency" and explaining at length that the federal common law rule in question "would be quite inconsistent with this scheme"); *Northwest Airlines,* 451 U.S. at 97, 101 S.Ct. at 1583-84 (explaining that the enactment of a "comprehensive legislative scheme including an integrated system of procedures for reinforcement" indicates that Congress' omission of a particular remedy was deliberate and declining to "fashion new remedies that might upset carefully considered legislative programs"). More precisely, federal courts are not free to contradict a congressional policy choice that "speaks directly" to a particular question previously answered by federal common law. *See Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625, 98 S.Ct. 2010, 2015, 56 L.Ed.2d 581 (1978) (holding that, although "Congress has never enacted a comprehensive maritime code," federal courts may not award "loss of society" damages under general maritime law because the

Death on the High Seas Act expressly prohibits recovery of such damages).

Thus, "the question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law." *Milwaukee II*, 451 U.S. at 315 n. 8, 101 S.Ct. at 1792 n. 8. Applying this analysis, several considerations persuade us that Congress in enacting FIRREA in 1989 did not intend to preempt the federal common law *D'Oench* doctrine. In §§ 1821(d)(9)(A) and 1823(e)(1), Congress specifically carved out as an area of special federal concern the area involving the protection of the FDIC from secret or oral agreements.[17] Thus, the proper question to ask is whether Congress intended §§ 1821(d)(9)(A) and 1823(e)(1) to eliminate the entire body of federal common law known as the *D'Oench* doctrine.

As noted above, *United States v. Texas*, 507 U.S. 529, 534-36, 113 S.Ct. 1631, 1635, 123 L.Ed.2d 245 (1993) reaffirmed the principles that Congress legislates against the background of the existing common law, and that Congress has legislated with an expectation that that law will apply except when a statutory purpose to the contrary is evident. *Id.* at 534, 113 S.Ct. at 1635. In *Texas*, the long-established federal common law was that all parties, including states, who owed contractual debts to the federal government were obligated to pay prejudgment interest. The statute at issue, the Debt Collection Act of 1982, codified that obligation with respect to private debtors and made the obligation more specific and more

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[17] Also, of course, the Supreme Court in *D'Oench* initially identified this special area of federal concern as having been revealed in provisions of the Federal Reserve Act which that opinion construed. 315 U.S. at 456-57, 62 S.Ct. at 679.

onerous. The statute expressly defined the "persons" subject to the statute, and expressly excluded state and local governments and agencies. 31 U.S.C. § 3701(c). The Supreme Court rejected the argument that Congress intended to preempt the preexisting federal common law, thus relieving states of their obligation under prior law to pay prejudgment interest. The Court held that the statute did not "speak directly" to the obligation of the states, but rather was intended to reach only the obligations of private debtors. The Court was influenced by the evident purpose of the statute—to increase the efficiency of the government's debt collections. The contrary reading "would have the anomalous effect of placing delinquent States in a position where they had less incentive to pay their debts." *Id.* at 537, 113 S.Ct. at 1636. The Court rejected that interpretation, which would undermine the evident purpose of the statute.

Similarly, the question in the instant case is whether or not it is "evident" that Congress intended to preempt the longstanding federal common law *D'Oench* doctrine. There is no indication in the statute or the legislative histories of either the 1950 or the 1989 acts that Congress intended to preempt the federal common law. *See FDIC v. McClanahan,* 795 F.2d 512, 514 n. 1 (5th Cir.1986) (noting that the legislative history of the 1950 act does not mention the *D'Oench* decision and concluding that Congress did not preempt *D'Oench* by enacting § 1823(e)); *In re NBW Commercial Paper Litigation,* 826 F.Supp. 1448, 1459 (D.D.C.1992) (noting that the legislative history of FIRREA is "scant" with respect to the *D'Oench* doctrine and finding no indication that Congress intended to preempt it). Just as it had done in 1950, Congress in FIRREA incorporated parts of the evolving common law *D'Oench* doctrine, e.g., its application in both the corporate and receivership capacities, and its application to affirmative claims as well as defenses. Although the legislative history with respect to these two

sections of the mammoth FIRREA is sparse, what little there is suggests that Congress intended no change in existing law. *See, e.g.*, H.R.Rep. No. 54(I), 101st Cong., 1st Sess. 332, *reprinted in* 1989 U.S. Code Cong. & Admin.News 128 (describing FIRREA's addition of § 1821(d)(9)(A); "In general [FIRREA] provides, as the FDI Act *presently* provides, that no agreement can form the basis of a claim against the Corporation or the conservator or receiver unless it is in writing and properly approved and maintained in the records of the institution.") (emphasis added); *id.* at 335, 1989 U.S.Code Cong. & Admin.News 131 (describing the provision of FIRREA allowing the FDIC in its receivership capacity to invoke § 1823(e) as a clarification of prior law).

Significantly, neither FIRREA in general, nor §§ 1821 (d)(9(A) and 1823(e)(1) in particular, comprehensively address the *substance* of the federal common law *D'Oench* doctrine. The particular argument that Motorcity raises in this case—i.e., *that* §§ 1821(d)(9)(A) and 1823(e)(1) do not bar claims based on oral agreements with a failed bank if the borrower's loan is repaid before the FDIC takes over—reflects an issue which was not addressed at all by Congress in 1989. Congress did not focus on the *range* of secret agreements with respect to which the FDIC would be afforded protection. Rather, in this regard, the only relevant language is in § 1823(e)(1), which Congress merely carried over from the statute originally enacted in 1950. We therefore see no indication either in the language of the statute itself or in the legislative history that Congress undertook a comprehensive examination of the federal common law *D'Oench* doctrine, or made any attempt to address comprehensively that vast doctrine. "[S]uch reticence while contemplating an important and controversial change in existing law is unlikely. . . . At the very least, one would expect some hint of a purpose to work such a change, but there was none." *Edmonds v. Compagnie Generale Transatlantique,*

443 U.S. 256, 266-67, 99 S.Ct. 2753, 2759-60, 61 L.Ed.2d 521 (1979).

Congress' purpose in passing FIRREA was to strengthen the FDIC's long-established right to protect itself from secret agreements executed by failing banks. *See Gibson v. RTC*, 51 F.3d 1016, 1020 (11th Cir. 1995) ("Congress enacted FIRREA in 1989 in response to the growing crisis in the nation's banking and savings and loan industries."). One important goal of FIRREA was "to give the FDIC power to take all actions necessary to resolve the problems posed by a financial institution in default." *FDIC v. Wright*, 942 F.2d 1089, 1095-96 (7th Cir.1991) (quoting H.R.Rep. No. 54(I), 101st Cong., 1st Sess. 330, *reprinted in* 1989 U.S.Code Cong. & Admin.News 126), *cert. denied*, 504 U.S. 909, 112 S.Ct. 1937, 118 L.Ed.2d 544 (1992). The coexistence of the common law *D'Oench* doctrine and the statutory scheme presents no inconsistency with this purpose. Indeed, the history of the interaction between the *D'Oench* common law and the statute strongly indicates that Congress did not intend preemption. The statute at issue began in 1950 as a partial codification of the *D'Oench* case. Subsequently, just as the *D'Oench* decision itself was a common law rule fashioned to fill the interstices of federal statutes, courts continued to apply the common law *D'Oench* doctrine beyond the confines of the statutory language in order to fulfill Congress' purposes in enacting § 1823(e)(1). Thereafter, in the intervening forty years, the common law *D'Oench* doctrine and the cases under the statute evolved together, each drawing upon the other. The Supreme Court in *Langley v. FDIC*, 484 U.S. 86, 92-93, 108 S.Ct. 396, 402, 98 L.Ed.2d 340 (1987), interpreted the statute broadly in order to serve the purpose of the common law *D'Oench* case. Since the creation of § 1823(e)(1) in 1950, innumerable cases in every circuit court of appeals have held that the common law *D'Oench* doctrine and the statute continued to

apply and complement each other. Thus, in 1989, when Congress addressed this special area of federal concern as a small part of the overall crisis in the banking industry, Congress was looking at forty years of harmonious coexistence of the common law doctrine and the statute. When Congress merely carried over the substance of the § 1823(e)(1) language, we believe that the most reasonable reading of the congressional intent is that Congress codified parts of the evolving *D'Oench* common law, left the state of the law unchanged, and left in place both the statute and the federal common law *D'Oench* doctrine to fill in the inevitable gaps left by the statutory language. *See Inn at Saratoga Assocs. v. FDIC*, 60 F.3d 78, 82 (2d Cir.1995) (adhering to the common law *D'Oench* doctrine to fill in a gap left by the statute because failing to do so "would undercut an important purpose of [the *D'Oench*] doctrine—allowing the FDIC to rely on a bank's records when insuring the bank"); *NBW Commercial Paper*, 826 F.Supp. at 1460-61 ("While both *D'Oench* and the statutory provisions protect similar interests of the government, each is capable of a somewhat independent interpretation, . . . so that they do not completely overlap. It is this added protection given by *D'Oench*, which Congress has neither codified nor demonstrated any intent to repudiate, that remains viable in the interstices of FIRREA. . . . *D'Oench* can best be described as a safety net which Congress has left to insure that the specific wording of the statute does not prevent the true application of Congress' policies."). The common law doctrine has served the important function of filling the inevitable gaps left by the statutory language.

We conclude that it is even clearer in this case than in *Texas* that Congress did not intend to preempt the prior federal common law *D'Oench* doctrine. *Texas* held that the statute did not "speak directly" to the issue, notwithstanding the fact that the statute addressed the area of the government's debt collection and addressed pre-

judgment interest in particular, and notwithstanding the fact that Congress expressly excluded states from the operation of the statute. In the instant case, no language in the statute refers directly to the common law *D'Oench* doctrine. The only language in the statute even relevant to the issue presented by Motorcity—the range of oral agreements with respect to which the FDIC will be protected—is found in § 1823(e)(1), and its language was merely carried over intact from prior law.

As in *Texas*, our conclusion is supported by the evident purpose of FIRREA—to enhance the FDIC's ability to address the problems created by the increasing number of financial institutions in default. As in *Texas*, Motorcity's construction would have the "anomalous effect" of undermining the purposes of FIRREA. Specifically, Motorcity's interpretation seeks to take advantage of oral agreements, evading the statute and *D'Oench* merely because Motorcity has paid off its loan. Such an interpretation would undermine the core purpose of both the *D'Oench* doctrine and its statutory cousins, i.e., allowing the FDIC to make its necessary decisions and evaluations, which sometimes must be made with lightning speed, by relying on the written bank records.

For the foregoing reasons, we therefore hold that neither FIRREA, nor the Federal Deposit Insurance Act of 1950, preempted the federal common law *D'Oench* doctrine.

B. *Can Motorcity Avoid the D'Oench Doctrine if it Repaid its Loans to Southeast Prior to Bringing this Lawsuit?*

Our conclusion that the *D'Oench* doctrine has not been preempted by statute is reinforced by an examination of Motorcity's argument that §§ 1821(d)(9)(A) and 1823(e)(1) are inapplicable because Motorcity repaid its loan to Southeast before the FDIC was appointed receiver.

Pointing to § 1823(e)(1)'s reference to an "agreement which tends to diminish or defeat the [FDIC's] interest . . . in any asset acquired by it," Motorcity contends that § 1823(e)(1) does not bar any claims against the FDIC that do not affect the value of a specific asset of the bank, such as a note, acquired by the FDIC. Because it repaid its note, Motorcity argues that there is no longer any specific asset to which the alleged oral agreements relate. *See Murphy v. FDIC*, 61 F.3d 34, 37 (D.C. Cir.1995) (holding that § 1823(e) applies only when the FDIC's interest in a specific asset would be impaired by the alleged secret agreement); *Inn at Sarotoga Assocs. v. FDIC*, 60 F.3d 78 (2d Cir.1995) (holding that a promise to make a loan is not covered by § 1823(e) because a promise is not an "asset"); *John v. RTC*, 39 F.3d 773, 776-77 (7th Cir.1994) ("Section 1823(e) requires an identifiable 'asset' which is acquired by the bank and then transferred to the regulatory agency, and to which the unenforceable agreements must relate."); *Murphy v. FDIC*, 38 F.3d 1490, 1500 (9th Cir.1994) (en banc) (holding that § 1823(e) does not apply to a claim relating to a letter of credit; a letter of credit is a liability, not an asset); *Thigpen v. Sparks*, 983 F.2d 644, 648-49 (5th Cir.1993) (analyzing both §§ 1821(d)(9)(A) and 1823(e) and concluding that these statutes are limited by a "specific asset" requirement); *FDIC v. Bracero & Rivera, Inc.*, 895 F.2d 824, 830 (1st Cir.1990) (where a note was discharged by the payment and cancellation of the underlying debt before the FDIC ever obtained it, the note was not an "asset" protected by § 1823(e)) (dicta); *Commerce Federal Sav. Bank v. FDIC*, 872 F.2d 1240, 1246 (6th Cir.1989) (where the indebtedness secured by a deed of trust is extinguished by operation of law before the FDIC acquires the failed bank, the FDIC has acquired no asset and therefore may not invoke § 1823(e)).

In light of our holding that the federal common law *D'Oench* doctrine has not been preempted, we need not

decide whether §§ 1821(d)(9)(A) or 1823(e)(1) are limited to claims that impair the FDIC's interest in a specific asset. *See Brookside Assocs. v. Rifkin*, 49 F.3d 490, 495 (9th Cir.1995) (decling to address the extent to which § 1823(e) is limited by a specific asset requirement because the common law *D'Oench* doctrine is not so limited). Indeed, we reaffirm the principle that the common law *D'Oench* doctrine is not limited to claims relating to a specific asset of the bank that has been acquired by the FDIC. *RTC v. Dunmar Corp.*, 43 F.3d 587, 594-95, 597 (11th Cir.) (en banc) (holding that, regardless of whether a specific asset is involved, *D'Oench* applies to claims or defenses that relate to ordinarily banking transactions), *cert. denied sub nom. Jones v. RTC*, —— U.S. ——, 116 S.Ct. 74, 133 L.Ed.2d 33 (1995); *OPS Shopping Ctr., Inc. v. FDIC*, 992 F.2d 306, 309 (11th Cir. 1993) (rejecting the argument that the common law *D'Oench* doctrine is limited by a specific asset requirement). Other circuits are in agreement on this issue. *See, e.g., Inn at Saratoga Assocs. v. FDIC*, 60 F.3d 78, 82 (2d Cir.1995) (rejecting the argument that the *D'Oench* doctrine is limited by an "asset" requirement, because such a requirement "would undercut an important purpose of that doctrine—allowing the FDIC to rely on a bank's records when insuring the bank"); *Brookside Assocs. v. Rifkin*, 49 F.3d 490, 496 (9th Cir.1995) ("[W]e hold that the commonlaw [*D'Oench*] doctrine applies to bar suit even when the RTC does not acquire a specific asset whose value is affected by the alleged secret agreement."); *Jackson v. FDIC*, 981 F.2d 730, 734-35 (5th Cir.1992) (holding that claims that do not diminish or defeat the FDIC's interest in any specific asset are nevertheless *D'Oench* barred, in light of the "established purpose of the [*D'Oench*] doctrine" to protect the FDIC's reliance on the bank's records); *Timberland Design, Inc. v. First Serv. Bank for Sav.*, 932 F.2d 46, 49-50 (1st Cir.1991) (per curiam) ("*D'Oench* protects the FDIC from Timberland's affirmative claims which are

based upon an alleged oral agreement to lend money in the future."); *Hall v. FDIC*, 920 F.2d 334, 339 (6th Cir.1990) ("*D'Oench* is important for allowing banking authorities to determine exactly what a bank's assets and liabilities are . . . [and] may therefore be invoked even where FDIC does not have 'an interest in an asset.' "), *cert. denied*, 501 U.S. 1231, 111 S.Ct. 2852, 115 L.Ed.2d 1020 (1991).

Motorcity's argument, that repaying a loan before filing tort claims precludes the FDIC from invoking the *D'Oench* doctrine, would result in absurdity. For example, suppose that a plaintiff wished to bring tort claims against the FDIC on the basis of alleged oral representations made by the failed bank in connection with the negotiation of the plaintiff's loan, and suppose that the alleged oral representations contradict the written loan terms. This hypothetical plaintiff's claims would fall within the core of the *D'Oench* doctrine and would be barred. *See In re Geri Zahn, Inc.*, 25 F.3d 1539, 1544 (11th Cir.1994). Under Motorcity's argument, however, the plaintiff could circumvent the *D'Oench* bar simply by paying off the balance of his or her loan before filing suit, leaving the FDIC without an interest in a specific asset. Such a result would seriously undermine the policies of the *D'Oench* doctrine: to protect the bank examiners who rely on the bank's records in assessing the bank's condition, to protect the FDIC's ability to insure deposits, and to place the burden on borrowers to make sure that all of the terms of their loan agreements are in writing.

The Ninth and Sixth Circuits have held that the *D'Oench* doctrine cannot be avoided by repaying a loan before filing suit. In *Brookside*, the plaintiff brought fraud claims against the RTC, as receiver for a failed bank, alleging that the bank's officials misrepresented the appraised value of some condominiums. 49 F.3d at 490. In reliance on the alleged misrepresentations, the plaintiff purchased the condominiums, executing a nonrecourse note and first

deed of trust in favor of the bank. The plaintiff defaulted on its loan, and the bank foreclosed on the condominiums. Six months later, the RTC took over the failed bank. At that time, the plaintiff's note and deed of trust were no longer on the bank's books because they had been extinguished by the foreclosure sale. The plaintiff argued that the *D'Oench* doctrine did not apply, because the fraud claims did not diminish the RTC's interest in a specific asset it had acquired from the bank. The Ninth Circuit squarely rejected the plaintiff's argument:

> [T]o strip the banking authority of *D'Oench, Duhme* protection [in this situation] would give debtors a message: If you relied on unrecorded representations when you borrowed from the bank, wait until your note is extinguished—or extinguish it yourself by paying it off—before you file suit. It does not make sense, in light of *D'Oench, Duhme* policy, to allow the doctrine's applicability to hinge on a procedural technicality easily manipulable by debtors.

Id. at 496.

Similarly, in *Hall*, the plaintiffs sued the FSLIC as receiver of a failed bank ("Commerce"), seeking damages arising out of Commerce's breach of an unwritten agreement to advance additional funds on the plaintiffs' loan. 920 F.2d at 334. Approximately three years before Commerce fell into receivership, the plaintiffs secured a loan from another bank and repaid the Commerce loan. The plaintiffs argued that because they owed Commerce nothing when the FSLIC took it over, the FSLIC had no interest in any specific Commerce asset and thus the *D'Oench* doctrine did not apply. The Sixth Circuit rejected the plaintiffs' argument:

> There are . . . instances where FDIC no longer has an interest in an asset, but where the logic of *D'Oench* should still apply to protect FDIC. For example, an obligor and a bank in receivership might have mutual breach of contract claims growing out

> of loan documents in the bank's records. The obligor, anticipating a suit by FDIC, might quickly pay off the note in an attempt to block FDIC's resort to the *D'Oench* doctrine. Under these circumstances, the fact that the obligor paid off the debt so as that FDIC did not have "an interest in an asset" should not prohibit FDIC from invoking *D'Oench*.

Id. at 339.

Because the common law *D'Oench* doctrine has not been preempted, and because the common law *D'Oench* doctrine is not limited by a specific asset requirement, Motorcity's repayment of its loan does not preclude the application of the *D'Oench* bar. We now turn to the application of the *D'Oench* doctrine to Motorcity's proposed tort claims.

C. *Applications of D'Oench; Are Motorcity's Claims "Free Standing" Torts?*

The gravamen of Motorcity's complaint is that Southeast should have notified Motorcity's absentee owners that out-of-trust sales were occurring at the automobile dealership. Motorcity does not argue that Southeast breached the written floor plan financing agreement. As the district court found, the written agreement imposes no duty on Southeast to monitor the dealership for the benefit of Motorcity and no duty to inform Motorcity of any out-of-trust sales.

Motorcity does not challenge the district court's reading of the written contract; rather, Motorcity relies primarily on alleged oral agreements and representations that Southeast would monitor the business not only for its own benefit but also for the benefit of Motorcity's absentee owners. However, because the FDIC was entitled to rely on the bank's records to ascertain the extent of the bank's contractual obligations pursuant to the floor plan financing arrangement, *D'Oench* prevents Motorcity

from offering extrinsic evidence to alter or to explain the written loan terms. *FSLIC v. Two Rivers Assocs., Inc.*, 880 F.2d 1267, 1276 (11th Cir.1989) (refusing to consider extrinsic evidence to interpret loan terms, because such evidence was not reflected in the bank's records); *FDIC v. Merchants Nat'l Bank of Mobile*, 725 F.2d 634, 639 (11th Cir.) (rejecting the use of extrinsic evidence not meeting the requirements of § 1823(e), including "intent of the parties" and the "surrounding circumstances," to determine whether the bank's participation in a loan was guaranteed by the Farmers Home Administration), *cert. denied*, 469 U.S. 829, 105 S.Ct. 114, 83 L.Ed.2d 57 (1984); *FDIC v. Bay Street Dev. Corp.*, 32 F.3d 636, 639-40 (1st Cir.1994) ("[O]f course, extrinsic evidence of additional [loan] terms is inadmissible against FDIC."); *RTC v. Daddona*, 9 F.3d 312, 319 (3rd Cir. 1993) ("[N]ot only does the existence of the agreement have to appear plainly on the face of an obligation, but the basic structure of that agreement—its essential terms—must also appear plainly on the face of that obligation."); *Community Bank of the Ozarks v. FDIC*, 984 F.2d 254, 257 (8th Cir.1993) ("Neither section 1823(e) nor *D'Oench* is satisfied by inferences drawn from a bank's records.").

Thus barred from any contract claim based on either written or oral agreements, Motorcity argues that its proposed claims against the FDIC are tort claims that are not related to the floor plan financing agreement. Specifically, Motorcity contends that Southeast breached an alleged fiduciary duty to notify Motorcity of the out-of-trust sales discovered in the course of Southeast's audits, and that Southeast acted negligently by conducting its audits in an unreasonable and incompetent fashion. Motorcity argues that these two claims fall within the "narrow exception" to the *D'Oench* doctrine for "free standing tort claims." *In re Geri Zahn*, 25 F.3d 1539, 1543 (11th Cir.1994).

The *D'Oench* doctrine bars all claims—even those sounding in tort—that are "sufficiently intertwined with regular banking transactions, such that exclusion of the alleged 'secret agreement' accords with the underlying policies of *D'Oench*." *Id.* at 1543; *OPS Shopping Ctr. v. FDIC*, 992 F.2d 306, 310 (11th Cir.1993).[18] In other words, a tort claim involving any "scheme or arrangement whereby the banking authority is likely to be misled" cannot be asserted against the banking authority. *RTC v. Dunmar Corp.*, 43 F.3d 587, 593 (11th Cir.) (en banc), *cert. denied sub nom. Jones v. RTC*, —— U.S. ——, 116 S.Ct. 74, 133 L.Ed.2d 33 (1995); *see also Langley v. FDIC*, 484 U.S. 86, 92-93, 108 S.Ct. 396, 402, 98 L.Ed.2d 340 (1987) (explaining that the term "agreement" in § 1823(e) should be interpreted broadly to comport with the policies underlying the common law *D'Oench* doctrine). In *Langley*, for example, the borrower attempted to defend against a note that had been acquired by the FDIC by arguing that the note had been procured by the bank's oral misrepresentations about the acreage of the mortgaged property, the extent of the mineral deposits, and the presence of preexisting mineral rights leases. *Id.* at 89, 108 S.Ct. at 400. Because these alleged fraudulent misrepresentations of fact occurred during discussions surrounding an ordinary banking transaction and involved matters that should have been included in the documents contained in the bank's records, the Supreme Court held that the misrepresentations constituted "agreements" under § 1823(e)(1). Thus, the Langley's fraud defense was barred, notwithstanding the fact that it sounded in tort. *Id.* at 96, 108 S.Ct. at 403.

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[18] The principal policies underlying the *D'Oench* doctrine are (1) to permit federal and state bank examiners to rely upon the bank's records of regular banking transactions in evaluating the institution's fiscal soundness; (2) to "ensure mature consideration of unusual loan transactions by senior bank officials," and (3) to "prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure." *Langley v. FDIC*, 484 U.S. 86, 91, 108 S.Ct. 396, 401, 98 L.Ed.2d 340 (1987).

Dunmar involved a borrower's tort claims arising from a failed S & L's oral representations that it would lend additional monies to the borrower, extend the time for payment of a loan, and permit a qualified buyer to assume the borrower's mortgage. 43 F.3d at 587. Because "the nature of each alleged oral agreement or representation relates to regular banking transactions and should have been documented in the bank records," we held that the *D'Oench* doctrine barred the borrower's tort claims. *Id.* at 595. Similarly, *In re Geri Zahn* involved claims of fraud, wrongful dishonor, and intentional interference with a business relationship. 25 F.3d at 1539. These claims arose out of agreements and misrepresentations alleged to have occurred during loan negotiations, and they contradicted the express terms of the loan documentation. We held that the claims fell "well within the core of the *D'Oench* bar," because "[t]he alleged oral agreements were obviously part and parcel of the loan negotiations" and involved "matters which would normally be reflected in the records of regular banking transactions." *Id.* at 1544.

This circuit's decision in *OPS* is also relevant. 992 F.2d at 306. In that case, the plaintiff sued the bank for its refusal to pay on a letter of credit that was not reflected in any of the bank's records. The court held that the *D'Oench* doctrine barred the plaintiff's claims against the FDIC, citing the principle that " 'a private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution's records.' " *Id.* at 308 (quoting *Baumann v. Savers Fed. Sav. & Loan Ass'n*, 934 F.2d 1506, 1515 (11th Cir. 1991), *cert. denied*, 504 U.S. 908, 112 S.Ct. 1936, 118 L.Ed.2d 543 (1992)). Because the claims in *OPS* related directly to ordinary banking transactions (i.e., the rights and obligations relating to the issuance of a letter of credit by the bank), banking examiners reasonably

would expect the records of regular banking transactions to reflect the plaintiff's letter of credit, and thus the *D'Oench* bar applied. *Id.* at 310.

In deciding that the *D'Oench* doctrine barred the plaintiff's claims against the FDIC, the *OPS court* extensively discussed the scope of the free standing tort exception articulated in *Vernon v. FDIC*, 981 F.2d 1230 (11th Cir.1993) (*Vernon II*). The tort claims in *Vernon II* involved alleged violations of securities laws and related claims arising from the claimants' purchase of preferred stock and warrants to purchase common stock in the failed institution itself. Because "the relevant records would reside in the department of the bank which handled the sale or transfer of the bank's own stock," and would not appear among the records of "regular banking transactions," the claims in *Vernon II* constituted free standing torts, not barred by the *D'Oench* doctrine. *OPS*, 992 F.2d at 310-11. Thus, the court drew a distinction: on the one hand, typical claims like employment discrimination and automobile accidents would be free standing torts not barred by *D'Oench;* on the other hand, those claims relating to "ordinary banking transactions" and imposing obligations on the bank with respect thereto—obligations that would ordinarily be reflected in the records of banking transactions—would be *D'Oench*-barred unless thus recorded. In deciding whether the free standing tort exception applies, therefore, "the key inquiry is one of relatedness" to ordinary banking transactions, and "the relatedness requirement rests upon the recognition that the *D'Oench* doctrine does not encompass those free standing torts which do not implicate the records of regular banking transactions." *In re Geri Zahn*, 25 F.3d at 1543-44. The *D'Oench* doctrine bars reliance on oral agreements to support tort claims that relate directly to ordinary banking transactions and involve obligations of the lender that should be reflected in the records of regular banking transactions. *Id.* at 1544.

Motorcity's claim is based primarily upon alleged oral agreements and representations that Southeast would

monitor the business for Motorcity's benefit, would conduct regular audits, and would advise Motorcity of any irregularities, especially out-of-trust sales.[19] Motorcity claims that such representations were made during the negotiations preceding the signing of the floor plan financing agreement and during the implementation thereof. It is clear that any such negotiations and representations are intimately related to the floor plan financing agreement and should have been reflected in the written agreement. Southeast's alleged promises and representations were "part and parcel" of the loan negotiations, and as such relate directly to the financing agreement, a regular banking transaction. *In re Geri Zahn*, 25 F.3d at 1544. Because "[b]anking examiners who inspect and evaluate the bank records reasonably expect the records of regular banking transactions to reflect *all* of the rights and liabilities of the bank regarding such regular banking transactions," *OPS*, 992 F.2d at 310, it follows that banking examiners would reasonably expect Southeast's undertaking of unusual duties to Motorcity to be reflected in such records. Moreover, it accords with the policies underlying § 1823(e)(1) and *D'Oench* to require such unusual undertakings by a lender to appear among the bank's

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[19] Specifically, Motorcity alleges that Southeast acknowledged the concerns of Motorcity's absentee owners, and represented to Motorcity.

(1) that Southeast was experienced in handling floor plan financing, that it "knew what it was doing," and that it had handled floor plan financing for the largest car dealership in the country;

(2) that a senior executive at Southeast personally would manage the Motorcity account;

(3) that Southeast would audit the floor plan monthly and inform Motorcity's investors immediately upon discovering any irregularities, particularly with respect to out-of-trust sales; and

(4) that Southeast's duty to conduct audits and to inform Motorcity of the results would be set forth in the written agreement.

records. *Langley*, 484 U.S. at 92, 108 S.Ct. at 401 (stating that one purpose fulfilled by § 1823(e)'s writing requirements is to "ensure mature consideration of unusual loan transactions by senior bank officials").

Motorcity seeks to impose additional obligations on Southeast directly related to the financing agreement, obligations which one would expect to be reflected in the bank's records. However, the written documents did not reflect such additional obligations, nor did they otherwise appear in the bank's records. We readily conclude that the very core of the *D'Oench* doctrine bars any reliance by Motorcity on such oral agreements and representations. The free standing tort exception does not apply.

D. *Dissecting Motorcity's Claims; Assessing Whether a Viable Claim Remains After Stripping Away Reliance on Oral Agreements*

In order to evaluate Motorcity's state law tort claims, we must focus precisely on the nature and contours of each. As noted above, the core of the *D'Oench* bar prevents any reliance by Motorcity on oral agreements. We must carefully examine the elements of each state law claim and the source of the obligations Motorcity seeks to impose on Southeast; only then can we assess whether there is any viable state law claim after stripping away all reliance upon oral agreements or representations.

Motorcity asserts two state law claims, one based on fiduciary duty and one on negligence. We first address the fiduciary duty claim.

1. Fiduciary Duty Claim

Motorcity's proposed fiduciary duty claim requires it to establish that Southeast voluntarily assumed an obligation to act for Motorcity's benefit. The claim that Southeast breached a fiduciary duty to notify Motorcity about the out-of-trust sales necessarily depends upon the existence of a fiduciary relationship. *See Barnett Bank of West*

Florida v. Hooper, 498 So.2d 923, 925 (Fla.1986) ("The usual relationship between a bank and its depositor is one of debtor to creditor . . . not ordinarily imposing a duty of disclosure . . . [but where the bank] has established a relationship of trust and confidence . . . the bank may be found to have assumed a duty to disclose facts.").[20] Under Florida law, it is clear that a lender does not ordinarily owe fiduciary duties to its borrower. *See, e.g., Keyes Jeep Eagle, Inc. v. Chrysler Corp.*, 897 F.Supp. 1437, 1443 (S.D.Fla.1995) (holding that, under Florida law, a floor plan financing agreement does not create fiduciary duties); *Metcalf v. Leedy, Wheeler & Co.*, 140 Fla. 149, 191 So. 690 (1939) (holding that, in an arms-length transaction, there is no duty on either party to act for the benefit or protection of the other party; *Vassar v. Smith*, 134 Fla. 346, 183 So. 705 (1938) (same); *Edwards v. Lewis*, 98 Fla. 956, 124 So. 746 (1929) (same); *Capital Bank v. MVB, Inc.*, 644 So.2d 515, 518 (Fla.App. 3 Dist.1994) ("Generally, the relationship between a bank and its borrower is that of creditor to debtor, in which the parties engage in arms-length transactions, and the bank owes no fiduciary responsibilities."), *review denied*, 659 So.2d 1086 (Fla.1995); *Watkins v. NCNB Nat'l Bank*, 622 So.2d 1063, 1065 (Fla.App. 3 Dist.1993) (same), *review denied*, 634 So.2d 629 (Fla.1994). In order to establish a fiduciary relationship, there must be an allegation of dependency by one party and a voluntary assumption of a duty by the other party to advise, counsel, and

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[20] *Hooper* also suggested that a bank's duty to disclose material facts to its customer might arise "where a bank, having actual knowledge of fraud being perpetrated upon a customer, enters into a transaction with that customer in furtherance of the fraud." *Id.* at 925. *See also Burger King Corp. v. Holder*, 844 F.Supp. 1528, 1532 (S.D.Fla.1993) (even without a fiduciary relationship, a duty to disclose material information might arise when a bank, under circumstances rising to the level of fraud, discloses certain information that is misleading because it is incomplete). Motorcity does not argue that Southeast's failure to disclose the out-of-trust sales constituted actionable fraud.

protect the weaker party. *Cripe v. Atlantic First Nat'l Bank*, 422 So.2d 820 (Fla. 1982); *Willis v. Fowler*, 102 Fla. 35, 136 So. 358 (1931); *Quinn v. Phipps*, 93 Fla. 805, 113 So. 419 (1927); *Watkins*, 622 So.2d at 1065. Stated differently, "the fact that one party places its trust in the other does not create a confidential relationship in the absence of some recognition, acceptance, or undertaking of the duties of a fiduciary on the part of the other party." *Bankest Imports, Inc. v. ISCA Corp.*, 717 F.Supp. 1537, 1541 (S.D.Fla.1989) (citing *Harris v. Zeuch*, 103 Fla. 183. 137 So. 135 (1931)). *See also Denison State Bank v. Madeira*, 230 Kan. 684, 640 P.2d 1235, 1244 (1982) ("[O]ne may not . . . unilaterally impose a fiduciary relationship on another without a conscious assumption of such duties by the one sought to be held liable as a fiduciary.").

As noted above, the primary basis for Motorcity's allegation of a fiduciary relationship was the alleged oral agreements and representations by Southeast. Having determined that Motorcity cannot rely upon such oral representations to prove its allegations that Southeast voluntarily assumed a fiduciary duty, we now assess whether Motorcity has alleged any other source of a fiduciary duty. Motorcity suggests the following argument in its briefs. Motorcity argues that the act of auditing the dealership and sending the summary audit reports sufficiently alleges, as a matter of Florida law, that Southeast voluntariiy assumed a fiduciary duty to perform the audits for Motorcity's benefit.[21] We conclude that the mere act of auditing the

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[21] Motorcity also mentions that its principal, David Hess, was a long standing customer of Southeast's through his medical practice. However, it is clear that Southeast's long standing business relationship with Hess, without more, cannot transform the lender-borrower relationship into a fiduciary one. *See e.g., Barnett Bank of West Florida v. Hooper*, 498 So.2d 923, 925 (Fla.1986); *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 196 N.W.2d 619, 624 (1972) ("The fact that plaintiff had done business with [the bank] for nearly twenty years could not by itself place [the bank] in a confidential relation to plaintiff.").

dealership and sending the summary audit reports does not constitute "circumstances exceeding an ordinary commercial transaction," *Capital Bank*, 644 So.2d at 521, and does not give rise to a fiduciary duty under Florida law.

A bank that audits its borrower's inventory and sends the borrower a courtesy copy or a "summary audit report" has not acted inconsistently with its role as a lender, and therefore Florida courts would not infer a fiduciary duty under these circumstances. *See Pinnacle Port Community Ass'n v. Orenstein*, 872 F.2d 1536, 1540 (11th Cir.1989) (bank that became heavily involved in monitoring its borrower's business did not become a joint venturer because the bank's "actions are consistent with the role of a lender that became increasingly involved with the project to protect its collateral"); *Saglio v. Chrysler First Commercial Corp.*, 839 F.Supp. 830, 833 (M.D.Fla.1993) (rejecting the existence of a fiduciary relationship between floor plan financing lender and guarantor where lender monitored borrower's inventory and provided periodic reports to guarantor); *Armetta v. Clevetrust Realty Investors*, 359 So.2d 540, 543 (Fla.App. 4 Dist.) (lender, who inspects construction project pursuant to right of inspection reserved in the loan agreement, is deemed to do so to protect its own interest in the loan; it has not acted beyond the role of a lender and thus owes no fiduciary duties), *cert. denied*, 366 So.2d 879 (Fla.1978); *Greiner v. Gen. Elec. Credit Corp.*, 215 So.2d 61, 63 (Fla.App. 4 Dist. 1968) (declining to find joint venture element where arrangement arguably indicative of the element is a well accepted business method not restricted to joint ventures). We therefore hold that the district court did not commit error in dismissing Motorcity's breach of fiduciary duty claim.[22]

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[22] Indeed, it is not surprising that Motorcity is unable to locate a single Florida case that imposes fiduciary-type duties on a bank without relying on oral representations. *See Burger King Corp. v. Holder*, 844 F.Supp. 1528, 1532 (S.D.Fla.1993) (borrower's allega-

In this case, the written financing agreement gave Southeast the right to audit. The mere conduct of that audit and sending a summary report thereof to Motorcity were entirely consistent with its role as lender. We readily conclude that no fiduciary duty was created under Florida law.[23]

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tions in support of a bank's fiduciary duty to disclose material information to borrower included "affirmative representations" that the bank "would assume certain responsibilities and duties" on borrower's behalf); *Barnett Bank*, 498 So.2d at 924 (bank officer orally told loan customer "that he was familiar with Hosner Investments and that they were sound and had passed Internal Revenue scrutiny"); *Capital Bank v. MVB, Inc.*, 644 So.2d 515 (Fla.App. 3 Dist.1994) (bank officer "expressly invited [customer's] reliance by urging [customer] to trust him and by reassuring [customer] that he was part of the Capital Bank family"; bank's "role exceeded that of a lender in a traditional leander/borrower relationship"), *review denied*, 659 So.2d 1086 (Fla.1995); *Chotka v. Fidelco Growth Investors*, 383 So.2d 1169, 1170 (Fla.App. 2 Dist.1980) (bank "became more than just a lender when [it] took title to the condominium project, completed construction, and, holding [itself] out to be the developer and owner of the project, advertised and sold units to purchasers.").

[23] Because Motorcity's fiduciary duty claim fails as a matter of Florida law, and because its negligence claim also fails under Florida law, *see infra*, we need not address the argument that nonverbal course of conduct evidence (such as the audit here) is *D'Oench*-barred, just like oral evidence, because it does not appear in the bank's records. *See Hall v. FDIC*, 920 F.2d 334, 340 (6th Cir.1990) (holding that *D'Oench* prevents borrowers from arguing that a condition in a loan agreement has been waived by the bank's nonverbal conduct at the loan closing), *cert. denied*, 501 U.S. 1231, 111 S.Ct. 2852, 115 L.Ed.2d 1020 (1991); *Beighley v. FDIC*, 868 F.2d 776, 783 (5th Cir.1989) (explaining that any inference derived from a bank's effort to help the borrower sell collateral would not appear in the bank's records and thus would be barred by § 1823(e)); *FDIC v. Hamilton*, 939 F.2d 1225, 1229 (5thCir.1991) ("The rationale which bars claims based on oral agreements and collateral writings is equally applicable to claims based on unwritten, albeit widespread and prevailing, banking customs.").

2. Negligence Claim

Motorcity's other state law claim is based upon negligence. Having stripped away any proper reliance by Motorcity upon oral agreements or representations, we must determine whether Motorcity can state a viable negligence claim based merely upon the fact that Southeast conducted the audit and sent summary reports thereof.

The voluntary assumption of a duty to protect Motorcity is also a necessary element of Motorcity's claim that the negligent performance of the floor plan audits caused its financial losses. Under Florida law, no defendant may be held liable for negligence unless he or she owes a legal duty to protect the plaintiff from harm. *Cooper Hotel Servs., Inc. v. MacFarland*, 662 So.2d 710, 712 (Fla.App. 2 Dist.1995), *review denied*, 670 So.2d 939 (Fla.1996); *Paterson v. Deeb*, 472 So.2d 1210, 1214 (Fla.App. 1 Dist. 1985), *review denied sub nom., Langston v. Paterson*, 484 So.2d 9 (Fla.1986). With respect to loan transactions, Florida law does not impose any duty on the lender to monitor the projects it finances for the protection of the borrower. *See Chotka v. Fidelco Growth Investors*, 383 So.2d 1169, 1170 (Fla.App. 2 Dist.1980) ("[A] lender is not under any duty to inspect the progress of construction for the benefit of anyone other than itself . . ." even if the loan provisions allow the lender to inspect the construction.). To be held liable for negligence, then, the bank must somehow *voluntarily assume* a duty to protect the borrower through the performance of the audits. *Saglio v. Chrysler First Commercial Corp.*, 839 F.Supp. 830, 834 (M.D.Fla.1993) ("[T]he law does not impose a duty upon [the lender] to reasonably perform inventory checks for [the guarantor's] benefit, [but] liability for misfeasance can lie where a party *voluntarily assumes a duty*." (emphasis added)); *Capital Bank v. MVB, Inc.*, 644 So.2d 515, 521 (Fla.App. 3 Dist.1994) ("Where the lender has *voluntarily assumed* additional roles, accompanying responsibilities properly follow." (em-

phasis added)), *review denied*, 659 So.2d 1086 (Fla. 1995). In this sense, Motorcity's negligence claim is similar to its breach of fiduciary duty claim, in that both tort claims require Southeast to have voluntarily assumed some kind of duty to act for Motorcity's benefit and protection.

Motorcity suggests that *Saglio, supra*, supports its contention that Southeast voluntarily assumed a tort duty to Motorcity. In *Saglio*, a guarantor of a loan alleged that a floor plan financing lender had voluntarily assumed a duty to audit the borrower's inventory for the guarantor's benefit, even though the written contract between the lender and the guarantor did not require the lender to do so. *Id.* at 833-34. During the course of the loan, the lender routinely conducted audits and submitted reports of its inventory checks to the guarantor. According to the court, this created a material issue of fact regarding whether the lender and the guarantor had modified their written contract through their conduct, and the court therefore allowed the guarantor's breach of contract claim to survive summary judgment. *Id.* Thus, although finding no fiduciary duty, the court found a contractual duty. Relying on dicta in *Banfield v. Addington*, 104 Fla. 661, 140 So. 893 (1932), the court also held that the lender could be held liable for negligence if it had failed to discharge its *contractual* duty to conduct audits on behalf of the guarantor with reasonable care.

The *Saglio* court's finding that the lender's audit activities could constitute the necessary voluntary assumption of a duty may have been dependent upon its finding of a contractual duty. If so, *Saglio* is distinguishable, because Motorcity—in its effort to avoid the *D'Oench* bar—has abandoned any contract claim. In any event, to the extent that *Saglio* suggests that the mere audit activities of a lender, as here, can give rise to the voluntary assumption of a duty in negligence, we find it unpersuasive.

We believe such a holding would be inconsistent with the Florida case law. The Florida courts have never ap-

plied the rationale of the *Banfield dicta* [24] to infer a tort duty when the actions taken are taken for the actor's own benefit. Indeed, the very statement of the rule of the *Banfield* dicta in the cases cited by the district court in *Saglio* highlights the fact that the rule applies only where actions are undertaken *for the benefit of another. See Barfield v. Langley*, 432 So.2d 748, 749 (Fla.App. 2 Dist.1983) (explaining that "action undertaken for the benefit of another . . . must be performed in accordance with an obligation to exercise reasonable care"); *Kaufman v. A-1 Bus Lines, Inc.*, 416 So.2d 863 (Fla.App. 3 Dist. 1982) (same); *Padgett v. Sch. Bd. of Escambia County*, 395 So.2d 584 (Fla.App. 1 Dist.1981) (same).

The only Florida cases which have squarely addressed the question of whether a duty is to be inferred from actions taken by a party for its own benefits have squarely rejected the inference of a duty. In *Rice v. First Fed. Sav. & Loan Ass'n*, 207 So.2d 22, 23 (Fla.App. 2 Dist.) (per curiam), *cert. denied*, 212 So.2d 879 (Fla.1968), for example, a mortgage lender conducted frequent inspections of the borrower's construction site and charged the borrower an "inspection and supervision" fee. The lender's inspections failed to reveal certain construction defects, which caused considerable damage to the borrower. The borrower sued the lender for negligent inspection, thus breaching an implied contractual obligation. The borrower claimed that by undertaking to inspect the construction site and charging the borrower a fee therefor, the lender voluntarily assumed a duty to inspect the construction site with reasonable care for the borrower's benefit. The court flatly rejected the borrower's argument. Because a reasonable lender would be expected to inspect the construction site to protect its own interest in the

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[24] The *Banfield* dicta was to the effect that a duty in negligence arises where a person undertakes a course of action. However, *Banfield* was an ordinary tort case imposing a duty on the owner of a beauty parlor to exercise ordinary care in the administration of a permanent wave on a customer's hair. 140 So. at 893.

mortgage, the court concluded that it would be "unreasonable" to infer from the bank's conduct that the bank had assumed a duty to perform the inspections on the *borrower's* behalf. *Id.*

Similarly, in *Armetta v. Clevetrust Realty Investors*, 359 So.2d 540 (Fla.App. 4 Dist. 1978), the Florida court rejected a claim very similar to Motorcity's claim. There, the lender made a loan to a developer of a condominium construction project. Several condiminium purchasers sought to impose liability on the lender "for a variety of alleged negligent acts in supervising the developer's actions." *Id.* at 542. Rejecting the debtor's negligence claim, as well as other claims, the court held: "A lender owes no duty to others to supervise the construction and development of projects which it has financed." *Id.* at 543.

Motorcity suggests that its complaint goes beyond *Rice* and *Armetta* because it alleges that Southeast periodically sent Motorcity summary reports of the audits. We do not believe that this allegation changes the result in this case. As a matter of common experience, it does not seem unusual for the lender to audit its borrower's business and, as a courtesy, to provide the borrower with a summary of the audit reports. Rather, such action is entirely consistent with the usual role of a lender. It would be unreasonable to infer from this everyday occurrence that Southeast voluntarily assumed a duty to audit the dealership for Motorcity's benefit and protection. In any event, it is implicit in both *Rice* and *Armetta* that the plaintiff was aware of the results of the lender's inspections; the claim was not that the lender failed to inform the plaintiff of defects revealed by the inspections, but rather the claim was that the inspections negligently failed to uncover the defects. We believe *Rice* and *Armetta* control the outcome of this case.

We conclude that the Florida case law would imply a tort duty only when actions are undertaken *for the benefit*

of another. It would be inconsistent with well-established Florida law to infer a tort duty merely on account of actions undertaken pursuant to the protection of one's own interests.[25]

Motorcity's negligence claim also fails for another, entirely independent reason; it is barred by Florida's "economic loss" rule. In *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So.2d 180 (Fla. 1987) the Florida Supreme Court held that a purchaser of services may not recover purely economic losses[26] in tort unless the other party's conduct establishes a "tort 'distinguishable from or independent of [the] breach of contract.' " *Id.* at 181 (citing *Lewis v. Guthartz*, 428 So.2d 222, 224 (Fla.1982)). *See also East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986). Following the *AFM* decision, courts have applied the economic loss rule to contracts involving financial services, including loans. *See, e.g., Interstate Sec. Corp. v. Hayes Corp.*, 920 F.2d 769 (11th Cir.1991) (applying Florida's economic loss rule to a contract for financial services); *Keyes Jeep Eagle, Inc. v. Chrysler Corp.*, 897 F.Supp. 1437 (S.D. Fla.1995) applying economic loss rule to floor plan financing agreement); *Strickland-Collins Const. v. Barnett Bank*, 545 So.2d 476 (Fla.App. 2 Dist.1989) (applying

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[25] In the similar context of the fiduciary duty cases discussed above, the Florida law is also clear that such actions do not constitute a voluntary assumption of a duty. We believe the fiduciary duty cases also support our conclusion that no tort duty is assumed.

[26] Economic loss includes " 'damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property.' " *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244, 1246 (Fla.1993) (quoting Note, *Economic Loss in Products Liability Jurisprudence*, 66 Colum. L.Rev. 917, 918 (1966)). Motorcity cannot avoid the economic loss rule because of the nature of the damages is seeks. Motorcity is clearly seeking to recover for economic losses.

economic loss rule to construction loan agreement). The rationale underlying the economic loss rule is that parties who have allocated risks among themselves by contract should not be permitted to ignore their bargain after incurring a loss involving the subject matter of the contract. *See Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 So.2d 628, 630 (Fla.1995) (holding that, in the absence of personal injury or damage to property outside the scope of the parties' contract, there is "no reason to burden society as a whole with the losses of one who has failed to bargain for adequate contractual remedies. . . ."); *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So.2d 899, 902 (Fla.1987) (finding "no reason to intrude into the parties' allocation of risk by imposing a tort duty and corresponding cost burden on the public" and holding that "contract principles [are] more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage"); *Strickland-Collins*, 545 So.2d at 476 (economic loss rule bars suit by general contractor against developer's lender for negligent failure to prevent the developer from misappropriating the loan proceeds; because general contractor participated in the loan negotiations and signed the loan agreement, the general contractor should have bargained for the lender's assumption of a *contractual* duty to supervise its borrower).

Motorcity asserts that the economic loss rule does not apply here because Southeast's tort is "independent" of the contract. Motorcity suggests that the tort is independent because the floor plan financing agreement does not address the risk that the bank might send Motorcity negligently-prepared audits.

While it is true that the economic loss rule would not bar a tort which was independent of the contract, we readily conclude that Motorcity's claim falls well within the core of the economic loss rule. The basis of Motor-

city's claim is that Southeast voluntarily assumed a duty to audit for the benefit of Motorcity. Thus, Motorcity seeks to impose on Southeast additional duties with respect to the financing arrangement. However, this is the precise subject about which the parties negotiated and concluded a contract; the contractual understandings allocated the risks among the parties. The core purpose of the economic loss rule is served by its application here. *Accord Strickland-Collins,* 545 So.2d at 447-78 (finding similar action on the part of a lender not to be a separate or independent tort).

Mortocity also argues that Florida courts would allow recovery of its economic damages in tort, because "no alternative means of recovery" on the contract exists.[27] We conclude that the Florida courts would apply the economic loss rule in this case to bar Motorcity's negligence claim . In *Airport Rent-A-Car,* the Florida Supreme Court recently clarified and narrowed any operation of an exception for "no alternative recovery." 660 So.2d at 628. There, the plaintiff's contract claim, a breach of warranty claim, failed for lack of privity. Nevertheless, the court rejected the "no alternative recovery" theory and applied the economic loss rule to bar the plaintiff's negligence claim. The court acknowledged.

> *that the Latite* [*Latite Roofing Co., Inc. v. Urbanek,* 528 So.2d 1381 (Fla.App. 4 Dist. 1988)] and *Moyer* [*A.R. Moyer, Inc. v. Graham,* 285 So.2d 397 (Fla.1973)] decisions sanctioned the "no alternative theory of recovery" exception; however, we disagree with . . . [plaintiffs'] assertion that it falls within the exception. As stated above, *Casa-Clara* [*Casa-Clara*

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[27] **Were it not for the *D'Oench* doctrine, Motorcity might have a viable contract claim based upon alleged oral agreements and representations. Because of the *D'Oench* bar, however, Motorcity must base its claim against the FDIC upon the written terms of the floor plan financing agreement, or upon Southeast's conduct in auditing the dealership.**

> *Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244 (Fla.1993)] specifically disapproved *Latite*, and limited *Moyer* to its facts.

Id. at 631. Just as the plaintiffs' contract claim in *Airport Rent-A-Car* was thwarted by a relevant legal principle (privity), so too was Motorcity's potential oral contract claim thwarted by a relevant legal principle, i.e., the *D'Oench* doctrine.

This case is like many Florida cases in which the economic loss rule has been applied. Motorcity and Southeast actually were the contracting parties; they negotiated a contract and consciously allocated duties and risks relating to the financing arrangement.[28] We conclude that the instant case falls well within the core purposes underlying the economic loss rule.

Indeed, the only Florida cases seemingly applying a "no alternative recovery" exception to the economic loss rule involve plaintiffs who were not parties to the underlying contract, and thus involve situations arguably lying outside of the core purposes of the economic loss rule. *See, e.g., First Fla. Bank v. Max Mitchell & Co.*, 558 So.2d 9 (Fla. 1990) (accountant who negotiated loan on behalf of corporation and personally delivered audits of corporation to bank, with knowledge that bank would rely on statements in deciding whether to loan money to corporation, could be held liable for the bank's economic losses due to negligent preparation of the audits—despite lack of contractual privity between accountant and bank); *First American Title Ins. Co., Inc. v. First Title Serv. Co. of the Florida Keys, Inc.*, 457 So.2d 467, 472 (Fla.1984) ("[W]hen an abstract is prepared in the knowledge or under conditions in which an abstracter should reasonably

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[28] *See, e.g., Interstate Sec.*, 920 F.2d at 774-75; *AFM*, 515 So.2d at 180-81 (tort claim barred between contracting parties); *Florida Power*, 510 So.2d at 902 (same); *Strickland-Collins*, 545 So.2d at 477 (same).

expect that the employer is to provide it to third persons for purposes of including those persons to rely on the abstract as evidence of title, the abstracter's contractual duty to perform the service skillfully and diligently runs to the benefit of such known third parties."); *A.R. Moyer, Inc. v. Graham,* 285 So.2d 397 (Fla.1973) (permitting general contractor to recover purely economic tort damages from an architect for negligent supervision of a project; the general contractor had no contract with the architect). These cases involve the creation of a kind of third party beneficiary status through negligence law "when an existing, specifically identifiable, intended beneficiary has not been given that status in the contract." *Sandarac Ass'n, Inc. v. W.R. Frizzell Architects,* 609 So.2d 1349, 1353 (Fla. App. 2 Dist.1992), *review denied,* 626 So.2d 207 (Fla.1993); *see also Airport Rent-A-Car,* 660 So.2d at 630-31 & n. 4 (explaining that *First American* involved a third-party beneficiary cause of action rather than a negligence cause of action, and limiting *Moyer* strictly to its facts).

After the *Airport Rent-A-Car* clarification and narrowing of the "no alternative recovery" exception, it is not clear what the scope of the exception will be even for an intended third party beneficiary who is not a party to the contract and thus is unable to participate in the allocation of the contractual duties and risks. However, in this case we need not define the precise contours of the exception. Unlike an intended third party beneficiary of a contract, whose "status can be eliminated by language in a document over which the third party has no control," *Sandarac,* 609 So.2d at 1353, Motorcity was a party to the floor plan financing agreement, actually participated in the contract negotiations and allocation of risks, and thus falls within the core purposes underlying the economic loss rule. Accordingly, we believe that Florida's courts would apply the economic loss rule to prevent Motorcity from

seeking tort remedies for the negligent performance of the audits.

VI. CONCLUSION

In summary, we hold that the federal common law *D'Oench* doctrine has not been preempted, that Motorcity's attempt to escape the *D'Oench* bar by repaying its loan fails, that the free-standing tort exception to the *D'Oench* bar is not applicable, and thus that *D'Oench* bars any reliance by Motorcity on oral agreements and representations. Having thus stripped away all reliance on oral agreements, we conclude that Motorcity is left without a viable state law claim based either on fiduciary duty or negligence. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

BIRCH, Circuit Judge, concurring specially:

The majority's well-crafted and thorough analysis has persuaded me that the court has reached the correct result in this case—and for the right reasons. As the author of the original panel opinion in this case, my initial focus had been on the district court decision we were charged to review. In that opinion, there was no analysis done of the Florida law on negligence, the district court finding "that it need not determine what duty, if any, Florida law imposed on Southeast as a result of Southeast's exercising its right to conduct audits under the agreement. Such a duty would arise from Southeast's actions, not from the language of the written agreement." R2-52-6. It appeared to us, in reviewing the district court's grant of a motion to dismiss and in refusing to allow a party to amend its complaint, that Motorcity had adequately pleaded Florida tort claims. Based upon the law argued to us, at the pleading stage, we concluded that:

> These tort claims derive from Florida common law[9]; they do not depend upon any written or oral contract provision between Motorcity and Southeast. Indeed, Motorcity would appear capable of pleading the same two counts had the floor plan financing agreement never included any mention of audits.

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[9] *See Barnett Bank of West Florida v. Hooper*, 498 So.2d 923, 925 (Fla.1986) (holding that, under certain conditions, a bank assumes a duty to disclose facts material to a transaction); *Saglio v. Chrysler First Commercial Corp.*, 839 F.Supp. 830, 834 (M.D.Fla.1993) ("Although the law does not impose a duty upon [a lender] to reasonably perform inventory checks for [a guarantor's] benefit, liability for misfeasance can lie where a party voluntarily assumes a duty.").

* * * *

Motorcity of Jacksonville, Ltd. v. Southeast Bank N.A., 39 F.3d 292, 299 (11th Cir.1994). Based upon *In re Geri Zahn*, 25 F.3d 1539, 1543 (11th Cir.1994), and the cases cited therein, we concluded that Motorcity's

negligent-auditing-and-disclosure tort claim was a "free standing tort," the prosecution of which was not barred by *D'Oench* or the statutory scheme. The majority's opinion presents an in-depth analysis of the Florida law of negligence, prefaced by the declaration "we must determine whether Motorcity can state a viable negligence claim based merely upon the fact that Southeast conducted the audit and sent summary reports thereof." Majority op. at 1991. After an exhaustive analysis the following conclusion is reached:

> We conclude that the Florida case law would imply a tort duty only when actions are undertaken *for the benefit of another*. It would be inconsistent with well-established Florida law to infer a tort duty merely on account of actions undertaken pursuant to the protection of one's own interests.

Majority op. at 1993. Thus, the majority concludes that, under the facts as pleaded in this case, no viable independent tort claim exits under Florida law. Based upon the analysis of the pertinent law presented by the majority, I must agree. However, I do not read the majority's opinion to negate or question the continuing vitality of the "free standing tort" exception to the *D'Oench* doctrine. Accordingly, I conclude that a well-pleaded, viable state law tort claim may still be pursued without the bar of *D'Oench* or the applicable federal statute discussed in the opinion. The fact that the tort claim arose out of the banking relationship should not prevent its prosecution.

APPENDIX B
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 93-4634

MOTORCITY OF JACKSONVILLE, LTD., a limited partnership, By and Through its general partner, MOTORCITY OF JACKSONVILLE, INC., a Florida Corporation, David Hess,

Plaintiffs-Appellants,

v.

SOUTHEAST BANK N.A., DAVID FEIGENBAUM,

Defendants,

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for SOUTHEAST BANK, N.A.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Dec. 5, 1994

Before KRAVITCH and BIRCH, Circuit Judges, and HOEVELER*, Senior District Judge.

BIRCH, Circuit Judge:

This appeal tests the limits of the free standing tort exception to the common law *D'Oench* doctrine, developed in *D'Oench Dume & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct.

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* Honorable William M. Hoeveler, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

676, 86 L.Ed. 956 (1942) and codified in 12 U.S.C. § 1823(e). Because we find that the alleged tortious conduct does not fall within the scope of regular banking transactions, we conclude that the *D'Oench* doctrine does not bar the tort claims at issue. We VACATE and REMAND for proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1986, plaintiffs-appellants Motorcity of Jacksonville, Ltd., Motorcity of Jacksonville, Inc. and David S. Hess (collectively "Motorcity") negotiated with Southeast Bank, N.A. ("Southeast") a floor plan financing agreement, under which Southeast would lend Motorcity funds to purchase inventory for its used car dealership (the "Agreement"). In the course of the negotiations, Motorcity informed Southeast that its principal investors, who lacked any experience in running a car dealership, planned to operate the dealership as absentee owners. Southeast assured Motorcity that its personnel were experienced with floor plan financing and that "the bank 'knew what is was doing.'" R2-58 Ex. 1 ¶ 14. Motorcity and Southeast executed the Agreement in June, 1987.

Pursuant to the Agreement, Southeast retained the right to audit Motorcity's records.[1] Of particular concern to both Southeast and Motorcity were "out-of-trust" sales, which result whenever a dealership fails to use the proceeds from a sale to repay the loan designated for that vehicle; continued unchecked, such out-of-trust sales can

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[1] Motorcity made the following affirmative covenant to Southeast: [Motorcity] will keep and maintain full and accurate accounts and records of its operations . . . and will permit [Southeast] and its designated officers, employees, agents and representatives, to have access thereto and to make examination thereof at all reasonable times, to make audits, and to inspect and otherwise check its properties, real, personal and mixed.

R1-35 Ex.B ¶ 5.7.

threaten a dealership's financial viability. Southeast hired an independent contractor to audit Motorcity on a monthly basis. Through these audits, the bank discovered a pattern of out-of-trust sales occurring at the dealership. Although Southeast sent summary audit reports to Motorcity, the bank allegedly failed to disclose these out-of-trust sales to Motorcity. Because of these unrecorded sales, the dealership failed in 1989, and Motorcity suffered damages in excess of $50,000.

Alleging breach of fiduciary duty, breach of oral contract, and negligence (the "Original Complaint"), Motorcity brought suit in Florida state court against Southeast and one of its employees. Less than a year later, Southeast was declared insolvent, and defendant-appellee Federal Deposit Insurance Corporation ("FDIC") was appointed as receiver for the failed bank. The FDIC was substituted for Southeast as defendant, whereupon the FDIC removed the case to federal court pursuant to 12 U.S.C. § 1819.

Motorcity amended its complaint to state a claim for breach of written contract (the "First Amended Complaint"). The district court dismissed this First Amended Complaint for failure to state a claim upon which relief could be granted. The court found that the Agreement gave Southeast the right, but not the duty, to audit Motorcity; thus Southeast was under no obligation to inform Motorcity of the out-of-trust sales. The court further ruled that the *D'Oench* doctrine and 12 U.S.C. § 1823(e) required any agreement between a failed financial institution and its customer to be in writing; consequently, any claims for breach of oral contract were barred.[2] Finally, the court held that the *D'Oench* doctrine also foreclosed Motorcity's tort claims. The court reasoned that [t]he genesis of this action is the Southeast floor plan financing

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[2] The *D'Oench* doctrine and its statutory counterpart, 12 U.S.C. § 1823(e), are discussed in Part II.B, *infra*.

agreement, whose written provisions do not support a breach of contract claim against the FDIC. No amount of artful pleading, including further amendments to the complaint, can alter the result." R2-52-8.

Motorcity moved for a rehearing and for leave to amend its complaint to add state tort claims for negligence and for breach of fiduciary duty to notify (the proposed "Second Amended Complaint"). The district court denied both motions. In its omnibus order, the court reiterated that the *D'Oench* doctrine barred all oral contract claims, including those claims recast as tort actions by " 'artful pleading.' " R2-67-1-2. On appeal, Motorcity contends that the district court erred in denying Motorcity's motion to amend its complaint.

II. DISCUSSION

A. *Jurisdiction*

As a threshold matter, we must decide whether this court has jurisdiction over the present appeal. We review questions of subject matter jurisdiction *de novo*. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 999 F.2d 503, 506 (11th Cir.1993). The FDIC asserts that the federal courts lack jurisdiction under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. No. 101-73, 103 Stat. 183 (codified as amended in scattered sections of 12 U.S.C.), because Motorcity has not yet exhausted its administrative remedies before the FDIC as required by 12 U.S.C. § 1821(d). Significantly, the FDIC has previously argued this issue in this case. Before the district court, the FDIC contended that FIRREA required Motorcity to submit its grievances to the FDIC's administrative claim review process before pursuing the matter in court. Motorcity responded by providing to the FDIC a Statement of Claim, in which Motorcity restated the factual and legal allegations of its Original Complaint. The FDIC disallowed

Motorcity's claim, whereupon the district court denied the FDIC's motion to dismiss as moot.

Before this court, the FDIC makes essentially the same argument with respect to the proposed Second Amended Complaint. The FDIC maintains that the Statement of Claim previously submitted by Motorcity did not contain "a claim based on torts 'wholly independent' from the written agreement." Appellee's Brief at 29. The FDIC contends that the tort claims asserted in Motorcity's proposed Second Amended Complaint are materially different from the claims previously reviewed by the FDIC, and thus "no court has jurisdiction to hear Motorcity's separate tort claims." *Id.*

Whether FIRREA creates a statutory exhaustion requirement is a question of first impression for this court. Section 1821(d)(13)(D) grants the FDIC primary jurisdiction over claims brought against banks for which the FDIC has been appointed receiver;

> Except as otherwise provided in this subsection, no court shall have jurisdiction over—
>
> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
>
> (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

12 U.S.C. § 1821(d)(13)(D). If claimants fail to submit their grievances to the FDIC, section 1821(d)(6)(B) divests them of their rights and remedies with respect to these claims:

If any claimant fails to—

> (i) request administrative review of any claim . . . or
>
> (ii) file suit on such claim (or continue an action commenced before the appointment of the receiver), before the end of the 60-day period [following the FDIC's disallowance or failure to review a submitted claim], the claim shall be deemed to be disallowed . . . as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

12 U.S.C. § 1821(d)(6)(B).[3] Reading these two provisions together, we conclude that FIRREA makes exhaustion of the FDIC's administrative complaint review process mandatory when the FDIC has been appointed receiver for a financial institution.[4] If the claimant has initiated its suit in a court prior to the FDIC's appointment as receiver, as has Motorcity, the claimant must exhaust its administrative remedies before continuing its action in state or federal court. *Cf.* 12 U.S.C. § 1821(d)(5)(F)(ii) ("Subject to paragraph (12) [requiring courts to suspend legal actions upon the receiver's request], the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.").

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[3] *See also* 12 U.S.C. § 1821(d)(5)(C)(i) ("[With certain exceptions] claims filed after the date specified in the notice published under paragraph (3)(B)(i) shall be disallowed and such disallowance shall be final.").

[4] In so holding, we are in agreement with all of our sister circuits that have considered the issue. *See Carney v. RTC*, 19 F.3d 950, 955 (5th Cir. 1994); *Brady Dev. Co. v. RTC*, 14 F.3d 998, 1005-06 (4th Cir.1994); *Bueford v. RTC*, 991 F.2d 481, 484 (8th Cir.1993); *Henderson v. Bank of New England*, 986 F.2d 319, 320-21 (9th Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 559, 126 L.Ed.2d 459 (1993); *Marquis v. FDIC*, 965 F.2d 1148, 1151-52 (1st Cir.1992); *Office & Professional Employees Int'l Union, Local 2 v. FDIC*, 962 F.2d 63, 66 (D.C.Cir.1992); *RTC v. Elman*, 949 F.2d 624, 627 (2d Cir.1991); *RTC v. Mustang Partners*, 946 F.2d 103, 106 (10th Cir.1991); *Rosa v. RTC*, 938 F.2d 383, 391 (3d Cir.), *cert. denied* —— U.S. ——, 112 S.Ct. 582, 116 L.Ed.2d 608 (1991).

Having concluded that FIRREA creates a statutory exhaustion requirement, we next decide whether Motorcity met that requirement. The FDIC argues that Motorcity's Statement of Claim did not adequately present the tort claims in the Second Proposed Complaint, and it cites a federal district court's decision in *Coleman v. FDIC*, 826 F.Supp. 31, 32 (D.Mass.1993), in support of its contention that appellees failed to exhaust their administrative remedies. In *Coleman*, the court considered an amended complaint that contained "entirely new causes of action based on entirely new facts," not previously submitted to the FDIC's administrative claims process. *See id.* at 32, 33. Citing FIRREA's exhaustion requirement, the court dismissed the new claims "to the extent that they [made] factual allegations not asserted in the original Complaint." *Id.* at 33.

Motorcity's Statement of Claim, while interwoven with references to the written agreement between Motorcity and Southeast, nonetheless makes repeated references to Southeast's duty to inform and to its alleged negligence in auditing Motorcity's records and inventory.[5] Indeed, the

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[5] Factual and legal allegations concerning Southeast's negligence and its duty to inform appear several times in Motorcity's State of Claim:

> When conducting the floor plan audits, Southeast had an *absolute duty to inform* Motorcity of any out-of-trust sales or irregularities in connection with sales that could result in out-of-trust situations. At all material times throughout the operations of Motorcity, David Hess *relied* on Southeast Bank in conducting appropriate audits and notifying Motorcity of any out-of-trust sale problems.
>
> . . . .
>
> Feigenbaum, the bank representative *has admitted*, that the audits were conducted in a *negligent* fashion. . . . Feigenbaum has admitted under oath that said audit system was flawed and *negligent*, that he undertook an obligation because of the contract and his commitment to Motorcity and Dr. Hess to immediately notify him if there were indeed out of trust sales. . . . Moreover, the Southeast representative has admitted that these

Statement of Claim mentions Southeast's duty to inform and its negligence in carrying out that duty as often as it highlights Southeast's failed contractual performance. These repeated references to Southeast's duty and to its negligence were sufficient to give FDIC notice that Motorcity's claim consisted of both contract and tort causes of action. Moreover, the same basic factual and legal allegations contained in the Statement of Claim form the crux of Motorcity's tort claims in its proposed Second Amended Complaint. Thus, the proposed Second Amended Complaint does not assert "entirely new causes of action based on entirely new facts." Motorcity therefore has exhausted its administrative remedies with respect to the tort claims in the proposed Second Amended Complaint, and we have jurisdiction over the present appeal. Nevertheless, as we discuss subsequently, if only state law claims remain after our decision and after the FDIC has filed its answer, this case should be remanded to the district court for transfer to state court for disposition of the state claims.

B. *Standard of Review*

Motorcity appeals solely the district court's denial of its motion to file the Second Amended Complaint. Our review standard for a district court's denying a motion to amend a complaint is abuse of discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S.Ct. 795, 802-03, 28 L.Ed.2d 77 (1971); *Shipner v. Eastern Air Lines, Inc.*, 868 F.2d 401, 407 (11th Cir. 1989). After a responsive pleading has been filed, subsequent amendments are permissible only with leave of court, which "shall be freely given when justice so re-

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negligent audits were conducted with other dealers. . . .

. . . .

Southeast undertook those audits pursuant to the written agreement . . . and breached its written, legal, ethical and moral *duty to inform* Motorcity and Hess of the out-of-trust situation.

SR1-69 Ex.A ¶¶ 17, 23, 24 (emphasis added).

quires." Fed.R.Civ.P. 15(a); *see Shipner*, 868 F.2d at 407. This liberal policy of allowing amendments under Rule 15(a) "circumscribes the exercise of the district court's discretion; thus, unless a substantial reason exists to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Shipner*, 868 F.2d at 407; *see also Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir.1993) (holding that "a justifying reason *must be apparent* for denial of a motion to amend") (emphasis added).

In this case, the district court denied Motorcity's motion to amend based on the court's legal determination that Motorcity's proposed tort claims were barred by the *D'Oench* doctrine. The futility of a proposed amended complaint can be a justifiable reason for denying leave to amend. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *See Moore*, 989 F.2d at 1131. When a district court denies leave to amend a complaint because of futility, we review *de novo*. *Keweenaw Bay Indian Community v. State*, 11 F.3d 1341, 1348 (6th Cir.1993); *see also Freer v. Dugger*, 935 F.2d 213, 216 (11th Cir.1991) ("Regarding the standard of review, conclusions of law by the district court are not binding on appellate courts and this court is free to substitute its judgment for the district court's on matters of law."). Accordingly, we review *de novo* the district court's determination that Motorcity's tort claims are barred by the *D'Oench* doctrine and its statutory counterpart, 12 U.S.C. § 1823(e).

C. *The D'Oench Doctrine*

The common law *D'Oench* doctrine protects federal deposit insurers, such as the FDIC, against claimants seeking to enforce unwritten, "secret agreements" between the claimants and failed banks. *See generally In re Geri Zahn, Inc.*, 25 F.3d 1539, 1542-43 (11th Cir.1994). We have interpreted the doctrine as follows:

> In a suit over the enforcement of an agreement originally executed between an insured depository institution and a private party, a private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution's records.

Baumann v. Savers Federal Savings and Loan Ass'n, 934 F.2d 1506, 1515 (11th Cir.1991), *cert. denied* —— U.S. ——, 112 S.Ct. 1936, 118 L.Ed.2d 543 (1992).[6]

Our circuit recognizes an exception to the *D'Oench*, doctrine for "free standing torts." *See In re Geri Zahn*, 25 F.3d at 1543. In *Vernon v. FDIC*, 981 F.2d 1230 (11th Cir.1993) [hereinafter *Vernon II*], we held that a bank shareholder was not barred by the *D'Oench* doctrine from asserting federal and state securities claims and causes of action for common law fraud and misrepresentation against the failed bank: "We simply do not think the

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[6] 12 U.S.C. § 1823(e), which codified the *D'Oench* doctrine, provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest theerunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1823(e).

D'Oench doctrine operates to bar free standing tort claims that are not related to a specific asset acquired by the FDIC". *Id.* at 1233-34; *accord Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1108 (11th Cir.1990) [hereinafter *Vernon I*]. Motorcity argues that the tort claims alleged in its proposed Second Amended Complaint do not derive from the written floor plan financing agreement but from Southeast's conduct in undertaking monthly audits of Motorcity's records and inventory. As such, Motorcity contends that its tort claims fall within the "free standing tort" exception to the *D'Oench* doctrine.[7]

As we have recently noted, however, the free standing tort exception protects only those tort claims that clear a "relatedness" hurdle. *In re Geri Zahn*, 25 F.3d at 1543-44. The *D'Oench* doctrine will bar an action, notwithstanding the fact that it sounds in tort rather than in contract, if the claim is "sufficiently intertwined with regular banking transactions, such that exclusion of the alleged 'secret agreement' accords with the underlying policies of *D'Oench*." *Id.* at 1543. Stated differently, "the relatedness requirement rests upon the recognition that the *D'Oench* doctrine does not encompass those free standing torts which do not implicate the records of regular banking transactions." *Id.* at 1544; *see also OPS Shopping Center, Inc., v. FDIC*, 992 F.2d 306, 311 (11th Cir. 1993) ("[W]e do not believe that the *Vernon* holding should be extended to exempt from the *D'Oench* doctrine claims which relate directly to regular banking transac-

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[7] We reject without discussion Motorcity's claim that the *D'Oench* doctrine and 12 U.S.C. § 1823(e) are inapplicable because Motorcity repaid its loan to Southeast before bringing suit. *See OPS Shopping Center, Inc., v. FDIC*, 992 F.2d 306, 309 (11th Cir.1993) ("We can discern nothing in the purpose of the *D'Oench* doctrine which would support appellant's proposed limitation of the doctrine [to a specific asset of a bank that has been acquired by the FDIC]. Moreover, every circuit court of appeals which has expressly addressed this argument has rejected it.")

tions and which should be reflected in the records of regular banking transactions.").

The relatedness requirement directs us to look beyond the form of Motorcity's allegation to the substance of its claim. We note initially that, in every precedent binding upon us that has barred tort claims by application of the *D'Oench* doctrine, the claimants have alleged some form of fraud in the inducement, misrepresentations that should have been memorialized in the final written agreement, but were not. For example, in *Langley v. FDIC*, 484 U.S. 86, 89, 108 S.Ct. 396, 400, 98 L.Ed.2d 340 (1987), the defendants attempted to justify nonpayment of a promissory note by charging that the bank had made oral misrepresentations concerning the acreage and mineral interests of land purchased with the borrowed money. The Supreme Court held that the *D'Oench* doctrine barred such defenses alleging only fraud in the inducement. *Id.* at 94, 108 S.Ct. at 402. Similarly, in *In re Geri Zahn*, the claimants sued a bank in tort when they found that the provisions of a written loan agreement varied from terms that they had expected following an oral discussion with the bank. We held that these tort claims did not fall within the free standing tort exception because they stemmed from oral misrepresentations that concerned the terms of the loan itself and that conflicted with the terms of the written loan agreement. *In re Geri Zahn*, 25 F.3d at 1544 ("The alleged oral agreements were obviously part and parcel of the loan negotiations. As such, they are matters which would normally be reflected in the records of regular banking transactions."). Finally, in *OPS Shopping Center*, the claimants sued to enforce a letter of credit that was not reflected in bank records. We concluded that "the claims involved in this case relate directly to ordinary banking transactions, i.e., the rights and obligations relating to the issuance of a letter of credit by the bank," and thus upheld the district court's application of the

D'Oench doctrine to bar those claims. *OPS Shopping Center*, 992 F.2d at 310.[8]

In contrast, Motorcity's state tort claims seek neither to alter nor to enforce the terms of the floor plan financing agreement. In its proposed Second Amended Complaint, Motorcity alleges two causes of action. First, Motorcity charges Southeast with breach of its fiduciary duty to notify Motorcity of the out-of-trust sales discovered in the course of Southeast's audits. Second, Motorcity maintains that Southeast acted negligently by conducting its audits in an unreasonable and incompetent fashion. These tort claims derive from Florida common law[9], they do not

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[8] Moreover, when other circuits have barred tort claims by application of the *D'Oench* doctrine, the tort claims have uniformly involved fraud in the inducement. *See FDIC v. Bathgate*, 27 F.3d 850, 868-69 (3d Cir.1994) (bank's warranties made in an unrecorded letter); *McCullough v. FDIC*, 987 F.2d 870, 873 (1st Cir. 1993) (bank's failure to disclose order requiring removal of hazardous waste from property); *Castleglen, Inc. v. RTC*, 984 F.2d 1571 (10th Cir.1993) (misrepresentation made by bank during negotiations for sale of real estate project); *In re 604 Columbus Ave. Realty Trust*, 968 F.2d 1332, 1345 (1st Cir.1992) (secret kickback scheme in which bank entered into loan in order to extract improper payments); *Oliver v. RTC*, 955 F.2d 583, 586 (8th Cir.1992) (breach of fiduciary duty based on violation of oral side agreements regarding loan); *Timberland Design, Inc. v. First Serv. Bank for Sav.*, 932 F.2d 46, 47, 50 (1st Cir.1991) (bank's secret oral loan commitment). The reasoning in these cases is best summarized by the *McCullough* court:

> The holding in *Langley* depends upon and flows from the following observation: as a matter of contractual analysis, a contractually bound party's attempt to avoid a contractual obligation and/or to seek damages through a claim of misrepresentation is nothing more than a challenge to the truthfulness of a warranty made by another party to the contract, and a concomitant claim that the truthfulness of that warranty was a condition of the first party's performance.

McCullough, 987 F.2d at 873.

[9] *See Barnett Bank of West Florida v. Hooper*, 498 So.2d 923, 925 (Fla.1986) (holding that, under certain conditions, a bank

depend upon any written or oral contract provision between Motorcity and Southeast. Indeed, Motorcity would appear capable of pleading the same two counts had the floor plan financing agreement never included any mention of audits. Thus, whereas the fraud in the inducement claims of *Langley*, *In re Geri Zahn*, and *OPS Shopping Center* can be seen as thinly disguised contract claims, Motorcity's tort claims remain, in substance, tort claims.

Additionally, the alleged torts do "not implicate the records of regular banking transactions." *In re Geri Zahn*, 25 F.3d at 1543. In *OPS Shopping Center*, we distinguished free standing torts from torts related to regular banking transactions on the basis of where the activities were reflected in bank records.

> Banking examiners who inspect and evaluate the bank records reasonably expect the records of regular banking transactions to reflect *all* of the rights and liabiiities of the bank regarding such regular banking transactions. By contrast, one would not expect the records of regular banking transactions to record activities unrelated to regular banking transactions. For example, in *Vernon I* and *Vernon II* the relevant records would reside in the department of the bank which handled the sale or transfer of the bank's own stock. If the free standing tort claim had related to the discriminatory treatment of an employee, the relevant records would reside in the personnel department of the bank. In the case of an automobile accident in the scope of an employee's employment, there would be no record at all, at least until the investigatory process took shape.

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assumes a duty to disclose facts material to a transaction); *Saglio v. Chrysler First Commercial Corp.*, 839 F.Supp. 830, 834 (M.D. Fla.1993) ("Although the law does not impose a duty upon [a lender] to reasonably perform inventory checks for [a guarantor's] benefit, liability for misfeasance can lie where a party voluntarily assumes a duty.").

OPS Shopping Center, 992 F.2d at 310. The records reflecting Southeast's potential liability in the instant case lie not in the floor plan financing agreement but in the audit reports that Southeast received from its auditors and that Southeast failed to communicate to Motorcity. The remaining "terms" of Southeast's obligation to Motorcity are to be found in Florida's common law. Were Motorcity's tort claims actually contract actions in tort clothing, the source of those claims would have resided in the provisions of the loan agreement or in oral agreements that should have been memorialized in the written document, but were not.

Since Motorcity's tort claims do not allege fraud in the inducement or implicate the records of regular banking transactions, we conclude that Motorcity's tort claims are not related to regular banking transactions. Consequently, the claims fall within the free standing tort exception and thus are protected from the bar of the *D'Oench* doctrine. Because the district court's denial of leave to amend was premised on its erroneous determination that *D'Oench* barred the proposed claims, we reverse the district court's order and remand for further proceedings in view of this opinion.

D. *Jurisdiction Revisited*

Motorcity's only remaining claims are state causes of action for breach of fiduciary duty and for negligence. Because both of these claims are based on Florida state law,[10] we must consider whether the federal courts retain subject matter jurisdiction over this case as remanded. When the FDIC was substituted as defendant for Southeast, it removed the case to federal district court pursuant to 12 U.S.C. § 1819. Section 1819(b) provides in pertinent part:

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[10] *See supra* note 9.

(2) Federal court jurisdiction

(A) In general

Except as provided in subparagraph (D), all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.

(B) Removal

Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the Corporation or the Corporation is substituted as a party.

(C) Appeal of remand

The Corporation may appeal any order of remand entered by any United States district court.

(D) State actions

. . . any action—

(i) to which the Corporation, in the Corporation's capacity as receiver of a State insured depository institution by the exclusive appointment by State authorities, is a party other than as a plaintiff;

(ii) which involved only the preclosing rights against the State insured depository institution, or obligations owing to, depositors, creditors, or stockholders by the State insured depository institution; and

> (iii) in which only the interpretation of the law of such State is necessary,
>
> shall not be deemed to arise under the laws of the United States.

12 U.S.C. § 1819(b)(2)(A)-(D).

As we explained in *Lazuka v. FDIC*, 931 F.2d 1530 (11th Cir.1991), section 1819 provides the FDIC with an exception to the "well-pleaded complaint" rule:

> By "deeming" actions to arise under federal law, Congress has eliminated the requirement that the basis for federal jurisdiction appear on the face of the plaintiff's complaint. Accordingly, because the "well-pleaded complaint" rule is inapplicable, the FDIC may raise a federal defense to rebut a plaintiff's showing that only interpretation of state law is necessary to the disposition of the case.

Id. at 1535. Thus, Article III's requirement that a case must arise under federal law before federal courts can exercise federal question jurisdiction remains intact, but section 1819 allows the FDIC to satisfy that requirement by alleging a federal question in the FDIC's answer. In the present case, the FDIC invoked federal question jurisdiction not by virtue of section 1819 itself, but by raising two federal question defenses—the *D'Oench* doctrine and Motorcity's failure to exhaust its administrative remedies under 12 U.S.C. § 1821(d). *See id.* at 1534-35 & n. 2 (analogizing section 1819 to 28 U.S.C. § 1442(a), as interpreted by the Supreme Court in *Mesa v. California*, 489 U.S. 121, 136, 109 S.Ct. 959, 968, 103 L.Ed.2d 99 (1989)); *id.* at 1535 ("By overcoming the 'well-pleaded complaint' rule, section 1819 permits the FDIC to allege federal defenses such as the *D'Oench* doctrine before a federal court.").

Because we have rejected both of the federal question defenses raised by the FDIC, this case returns to federal

district court without independent support for federal question jurisdiction. We note, however, that the FDIC has not yet filed an answer to any of Motorcity's complaints.[11] If the FDIC alleges a federal question defense in its answer, then section 1819 grants subject matter jurisdiction to the federal courts, and the burden shifts to Motorcity to show that section 1819(b)(2)(D) mandates a remand to state court. *Id.* (holding that the language of section 1819 places the burden on the plaintiff to show an exception under section 1819(b)(2)(D)). If the FDIC does not present a federal question defense, then no federal question is presented, and the case must return to Florida state court for resolution of the state tort claims.

III. CONCLUSION

Motorcity appeals from the district court's denial of its motion to amend its complaint for the second time. The district court's decision was based on its legal determination that Motorcity's proposed amendments, adding state tort claims for breach of fiduciary duty and for negligence, were futile. Because neither tort claim is sufficiently intertwined with regular banking transactions, they are free standing torts, not barred by the *D'Oench* doctrine. For these reasons, we VACATE the decision of the district court and REMAND the case for further proceedings consistent with this opinion.

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[11] Although the FDIC moved to file an amended answer after its substitution as defendant in this case, R1-30, the district court denied the motion as moot after the court granted Motorcity's motion to amend its Original Complaint. R1-36. Similarly, following our decision, the FDIC will have an opportunity to respond to Motorcity's Second Amended Complaint. *See* Fed.R.Civ.P. 15(a) ("A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.").

APPENDIX C

[Filed May 10, 1993]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 91-2305-CIV-HIGHSMITH

MOTORCITY OF JACKSONVILLE, LTD., a limited partnership, by and through its general partner, MOTORCITY OF JACKSONVILLE, INC., a Florida corporation and DAVID HESS,

Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for SOUTHEAST BANK, N.A.,

Defendant.

OMNIBUS ORDER

THIS CAUSE came before the Court upon Plaintiffs Motorcity of Jacksonville, Ltd. and David Hess's ("Motorcity and Hess") motion for rehearing and/or reconsideration of order granting defendant's motion to dismiss amended complaint; and motion for leave to file second amended complaint.

By order dated November 25, 1992, the Court dismissed Motorcity and Hess's complaint with prejudice, finding that their lender liability action was barred by the federal common law doctrine emanating from *D'Oench Duhme & Co., Inc. v. F.D.I.C.*, 315 U.S. 447 (1942) and the provisions of 12 U.S.C. § 1823(e). The Court further stated that "No amount of artful pleading, including further amendments to the complaint, can alter this result." After reviewing the arguments presented by

Motorcity and Hess in support of their motions for rehearing/and for leave to file a second amended complaint, the Court finds no grounds for disturbing its previous order. Therefore, it is hereby

ORDERED AND ADJUDGED that:

(1) Motorcity and Hess's motion for rehearing and/or reconsideration is DENIED.

(2) Motorcity and Hess's motion for leave to file second amended complaint is DENIED.

(3) Motorcity and Hess's motion for extension of time to reply in support of their motion for rehearing is GRANTED nunc pro tunc. Motorcity and Hess's reply is DEEMED timely filed.

(4) Defendant FDIC's motion to strike plaintiffs' reply is DENIED.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 9th day of May, 1993.

/s/ Shelby Highsmith
SHELBY HIGHSMITH
United States District Judge

APPENDIX D

[Filed Nov. 25, 1992]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case Uo. 91-2305-CIV-HIGHSMITH

MOTORCITY OF JACKSONVILLE, LTD., a limited partnership, by and through its general partner, MOTORCITY OF JACKSONVILLE, INC., a Florida corporation and DAVID HESS,

Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for SOUTHEAST BANK, N.A.,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

THIS CAUSE came before the Court upon Defendant Federal Deposit Insurance Corporation's ("FDIC") motion to dismiss the amended complaint, pursuant to *Fed. R. Civ. P.* 12(b)(6), for failure to state a claim upon which relief can be granted.

STANDARD OF REVIEW

To state a claim, *Fed. R. Civ. P.* 8(a) merely requires "a short and plain statement of the claim that will give defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 365 U.S. 41, 47 (1957) (quoting *Fed. R. Civ. P.* 8(a)). The court must "take the material allegations of the complaint

and its incorporated exhibits as true, and liberally construe the complaint in favor of the plaintiff." *Burch v. Apalachee Community Mental Health Servs., Inc.*, 840 F.2d 797, 798 (11th Cir. 1988), *aff'd sub nom.* Zinermon v. Burch., 494 U.S. 113 (1990).

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Motorcity of Jacksonville, Ltd. ("Motorcity") and David Hess [1] brought this action against Southeast Bank, N.A., ("Southeast") and David Feigenbaum, a Southeast officer, in state court action in October 1990. Motorcity, a used car dealership, had entered into a floor plan financing agreement with Southeast. After operating under the floor plan for approximately two years, the dealership failed. Southeast liquidated the inventory and applied the proceeds to Motorcity's outstanding debt. The Hess brothers paid off the remainder of the loan in 1991, approximately one year after commencement of this action.

In their state case, Motorcity and Hess asserted what amounted to a lender liability action, claiming breach of oral agreement, breach of fiduciary duty, and negligence. In support of their claims, Motorcity and Hess alleged that Southeast and Feigenbaum had agreed to conduct periodic audits of Motorcity and advise Hess of any problems, including out-of-trust sales.[2] Although Southeast conducted periodic audits and Feigenbaum reported to Hess that there were no problems, out-of-trust sales did occur. Motorcity and Hess claimed that this failure to report out-of-trust sales led to Motorcity's demise.

Upon its appointment as receiver of Southeast in the fall of 1991, the FDIC removed the action to this Court,

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[1] David Hess is a shareholder of Motorcity of Jacksonville, Inc., along with his brother Edward Hess. The corporation, in turn, is the general partner of Motorcity of Jacksonville, Ltd.

[2] An out-of-trust sale occurs when the proceeds from that sale do not go to pay off the loan amount corresponding to the car sold.

pursuant to 12 U.S.C. § 1821. Subsequent to the removal, the Court granted the FDIC's motion to substitute, making it the defendant in place of Southeast. The Court also granted Motorcity and Hess leave to amend their complaint. The amended complaint no longer names Feigenbaum as a defendant. It consists of a single breach of contract count against the FDIC.[3]

DISCUSSION

In support of its motion to dismiss, the FDIC relies on the federal common law doctrine developed in *D'Oench Duhme & Co., Inc. v. F.D.I.C.*, 315 U.S. 447 (1942), and its progeny, as well as on the provisions of 12 U.S.C. § 1823(e). The *D'Oench* doctrine bars a debtor of a failed bank from asserting an oral side agreement as a defense to his obligation. *In re NBW Commercial Paper Litig.*, 1992 WL 73135, at *4 (D.D.C. Mar 11, 1992). As one court has noted, the *D'Oench* doctrine "has become a solid defense to many of the lender liability claims inherited by the FDIC upon its appointment as receiver of a failed financial institution." *F.D.I.C. v. Armstrong Mall Assocs. Ltd. Partnership*, 1992 WL 175518, at *2 (D. Conn. Jul. 21, 1992).

Section 1823(e) further shields the FDIC from liability by providing that:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it . . . shall be valid against the Corporation unless such agreement
>
> (1) is in writing,

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[3] At the outset, the Court notes that Hess concedes he is not a proper party to the breach of contract action because the only parties who signed the financing agreement were Southeast and Motorcity. To remedy this problem, Hess seeks permission to further amend the complaint to assert a negligence claim. The Court addresses this issue at a later point in the order.

> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been continuously, form the time of its execution, an official record of the depository institution.

12 U.S.C.A. § 1823 (West 1989). "Courts have often applied section 1823(e) and the *D'Oench, Duhme* doctrine coextensively." *Tuxedo Beach Club Corp. v City Fed. Sav. Bank*, 749 F. Supp. 635, 642 (D.N.J. 1990). The rule emanating from these cases is:

> In a suit over the enforcement of an agreement originally executed between an insured depository institution and a private party, a private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution records.

Baumann v. Savers Fed. Sav. & Loan Assoc., 934 F.2d 1506, 1515 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1936 (1992).

Pursuant to this rule, Motorcity and Hess must rely on the terms of the written floor plan financing agreement for their breach of contract claim. (Agreement, Exhibit B to Amended Complaint.) Motorcity and Hess argue that the language of the agreement gave rise to a duty on Southeast's part to conduct audits and that such language reflected a bilateral obligation. By proffering these arguments, Motorcity and Hess attempt to come within a rec-

ognized exception to the *D'Oench* doctrine, which "does not bar the assertion of defenses based on a bilateral obligation which appears in the bank's records." *F.S.L.I.C. v. Two Rivers Assocs., Inc.*, 880 F.2d 1267, 1275 (11th Cir. 1989). *See also F.D.I.C. v. McCullough*, 911 F.2d 593, 601 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991) (To put a regulatory agency on notice that a bank had contractual obligations, a "borrower must be able to point to documents that clearly manifested the bilateral nature of the parties' rights and obligations.")

The terms of the agreement required Motorcity to provide Southeast with pertinent financial and operational records, and to permit bank inspection of such records and of the collateral. (Exhibit B to Amended Complaint, at ¶ 2.3.) The agreement also contained a provision whereby Motorcity permitted the bank "to make audits, and to inspect and otherwise check [Motorcity's] properties, real, personal and mixed." (Exhibit B to Amended Complaint, at ¶ 5.7.) The Court finds that the plain language of the agreement gave Southeast the right, but imposed no duty, to conduct audits. Moreover, nowhere in the agreement did Southeast explicitly accept an obligation to conduct audits. The absence of language in Motorcity and Southeast's agreement which "clearly manifested the bilateral nature" of the parties' obligations makes the *D'Oench* exception for bilateral agreements inapplicable to this case.

Next Motorcity and Hess argue that because Southeast undertook to perform audits, records of which were kept by Southeast, it had the duty to perform them competently. Motorcity and Hess rely on various Florida cases for this argument. The FDIC disputes the applicability of the cited cases to this factual scenario. The Court finds, however, that it need not determine what duty, if any, Florida law imposed on Southeast as a result of Southeast's exercising its right to conduct audits under the agreement. Such a duty would arise from Southeast's actions, not

from the language of the written agreement. Were the Court to adopt Motorcity and Hess' argument, the written agreement limitations of the *D'Oench* doctrine and Section 1823(e) would become meaningless.

Moreover, the Eleventh Circuit has declined to accept a similar invitation. In *Victor Hotel Corp. v. FCA Mortgage Corp.*, 928 F.2d 1077, 1079 (11th Cir. 1991), the borrowers requested, and the bank granted, a reallocation of existing loan funds. The bank records contained an internal memorandum, which reported the borrowers intention to request additional funds in the future should their request be granted. From this memorandum and the bank's decision to restructure the existing loan, the borrowers attempted to infer an obligation to fund future projects. *Id.* at 1082. The Eleventh Circuit found that the bank's action, together with the memorandum, did not constitute adequate documentary evidence in the bank's records to support a reasonable inference of breach. *Id.* at 1082-83. Likewise, the Court finds that Southeast's conduct of audits, together with the audit records, cannot give rise to a breach of contract claim against the FDIC. Alternatively, Motorcity and Hess argue that the bank's record of the audits constitutes a written agreement. Like the internal memorandum in *Victor Hotel*, an audit record is not an agreement. Moreover, such a record does not meet the execution and approval requirements of Section 1823.

Having reviewed the provisions of the written agreement, and taking the material allegations in the amended complaint as true, the Court finds no basis for a breach of contract claim. To forestall the demise of their action, Motorcity and Hess seek leave of court to assert a negligence claim against the FDIC, based on Southeast's alleged failure to conduct the audits properly. By recasting themselves into tort claimants, Motorcity and Hess attempt to fall within the ambit of *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101 (11th Cir. 1990). In *Vernon*, the Eleventh Circuit reviewed the history of the

D'Oench doctrine and found that in every case save one, the regulatory agency "asserted or defended the validity and enforceability of a particular debt or monetary obligation owed to the failed bank." *Id.* at 1107. The Eleventh Circuit concluded that the *D'Oench* doctrine did not extend to a suit by disappointed shareholders of a defunct bank because the shareholders were not "obligees trying to avoid their commitment on an asset" of the defunct bank. *Id.*

Because they have already paid off the Southeast loan, Motorcity and Hess argue that they are not obligees of Southeast, but tort claimants seeking recovery from Southeast's general assets.[4] Invoking the *Vernon* rationale, they ask the Court to permit negligence claims by both Motorcity (the contractual party) and Hess (the party who acknowledges he has no standing to bring a contractual claim). This argument lacks merit. Payment of the loan does not alter the nature of Motorcity and Hess' lender liability action. It simply means that Motorcity and Hess chose to pay off their debt without waiting for the conclusion of these proceedings. The genesis of this action is the Southeast floor plan financing agreement, whose written provisions do not support a breach of contract claim against the FDIC. No amount of artful pleading, including further amendments to the complaint, can alter this result.

CONCLUSION

The Court recognizes that the result visited on Motorcity and Hess is indeed harsh. The Eleventh Circuit has acknowledged this apparent inequity, but found it justifiable. *Baumann*, 934 F.2d at 1517 ("As between private parties and federal deposit insurance agencies both Congress and the Supreme Court have placed the burden

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[4] The Court notes that Motorcity and Hess made the final payment on the loan in 1991, well after they brought this suit in October 1990. Hence, Motorcity and Hess were still obligees of Southeast when this action commenced.

on private parties to document fully the contours of their obligations from the inception of the transaction.") Motorcity did not fully contour Southeast's purported obligations under the floor plan financing agreement. Motorcity and its owners, rather than the FDIC and the taxpaying public, must now beat the burden of this omission.

Based on these considerations, it is hereby

ORDERED AND ADJUDGED that the FDIC's motion to dismiss the amended complaint is GRANTED. The amended complaint is DISMISSED with prejudice. It is further

ORDER AND ADJUDGED that the FDIC's motion to file a reply memorandum in excess of ten (10) pages is GRANTED and the FDIC's motion to strike is DENIED as moot.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 25th day of November, 1992.

/s/ Shelby Highsmith
SHELBY HIGHSMITH
United States District Judge

APPENDIX E

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 90-51480 CA (26)

MOTORCITY OF JACKSONVILLE, LTD., a limited partnership, by and through its general partner, MOTORCITY OF JACKSONVILLE, INC., a Florida corporation, and DAVID S. HESS,

Plaintiffs,

v.

SOUTHEAST BANK, N.A., and DAVID FEIGENBAUM,

Defendants.

ORDER

THIS CAUSE having come before the court on the Motions of the Defendants, SOUTHEAST BANK, N.A. and DAVID FEIGENBAUM, to dismiss Plaintiffs' Complaint and to strike Plaintiffs' claim for punitive damages, and the court having examined the file, having heard argument and being otherwise fully advised in the premises it is

ORDERED AND ADJUDGED that said Motions are hereby DENIED. Defendants shall have 20 days from the date of this Order to answer the Complaint.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida.

Dated 2/8/91

/s/ Eugene J. Fierro
Circuit Court Judge

Copies furnished to:
Lawrence R. Heller, Esquire
David Pollack, Esquire

APPENDIX F